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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 499

THE NEW MEXICO PUBLIC SERVICE COMMISSION,
and JOSEPH A. BURSEY, PHIL LUCERO and
L. J. CHAMBARD, Commissioners,
and
OTERO COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioners,

vs.

COMMUNITY PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment and opinion of the Supreme Court of New Mexico, reported in 76 N. M................, 414 P. 2d 675, is printed and annexed hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of New Mexico was entered on March 21, 1966 (Appendix A; R. 394; 76 N. M............., 414 P. 2d (675). On June 1, 1966 the Supreme

Court of New Mexico denied rehearing (R. 544-A).[1] The jurisdiction of this Court to review by writ of certiorari a final judgment rendered by the highest court of a State in which a decision could be had "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States," is conferred by 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The sole question presented is whether the decision and judgment of the Supreme Court of New Mexico in this action erroneously held that New Mexico Laws 1961, Chapter 89 is invalid as violative of the Fourteenth Amendment to the Constitution of the United States in the manner it attempted to place rural electric cooperatives under the Public Utility Act (§§68-3-1 to 68-6-8, 68-7-1 to 68-11-1, 68-11-3 to 68-11-5, New Mexico Statutes Annotated, 1953 Compilation).[2]

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads, in material part:

> " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] The Supreme Court of New Mexico issued mandate on June 13, 1966. (R. 544-B)

[2] The Supreme Court of New Mexico coincidentally held said laws unconstitutional under Article II, Section 18 of the New Mexico Constitution. The opinion and judgment noted that New Mexico courts have held that "The equal protection of the Fourteenth Amendment of the Constitution of the United States and Article 2, Section 18 of the State Constitution have for all practical purposes the same effect" and relied upon the Fourteenth Amendment to reach its result under the New Mexico Constitutional provision. (R. 399-400; Appendix A, p. 42)

Section 18 of Article II of the Constitution of New Mexico reads:

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Laws 1961, Chapter 89, the laws questioned by the Supreme Court of New Mexico, because of length, are annexed hereto as Appendix B. The present Public Utility Act (§§ 68-3-1 to 68-6-8, 68-7-1 to 68-11-1, 68-11-3 to 68-11-5, N.M.S.A., 1953, is annexed hereto as Appendix C, the language added thereto by the challenged legislation being italicized and the previous language deleted by Laws 1961, Chapter 89 being enclosed within brackets. The Rural Electric Cooperative Act (§§ 45-4-1 to 45-4-32, N.M.S.A., 1953) is annexed hereto as Appendix D.

STATEMENT OF THE CASE

Petitioner, Otero County Electric Cooperative, Inc., hereinafter referred to as "Otero," is a corporation organized under the New Mexico Rural Electric Cooperative Act (§§ 45-4-1 to 45-4-32, N.M.S.A., 1953; Appendix D) and renders electric service to its members and others in Lincoln County and elsewhere in New Mexico. It has had a franchise from Lincoln County, New Mexico, since February, 1957, and has been subject to the jurisdiction of petitioner, the New Mexico Public Service Commission since and to the extent provided in the New Mexico Public Utility Act, as amended by Laws 1961, Chapter 89. (R. 21-22, 55)

Otero was organized in 1939, at which time there was not any electric service in the rural areas of Chaves, Otero and Lincoln Counties presently served by Otero. (R. 193-194) Otero's rate schedule was filed with the New Mexico Public Service Commission. (R. 210-212, 223, 225) Otero's rates are initially fixed "to a certain extent" by its Board of Trustees but "some of [the] rates are handed down from the R.E.A. from Washington," which makes "the final approval" of all of Otero's rates in effect. (R. 216-17)

Petitioner, the New Mexico Public Service Commission, hereinafter referred to as "Commission," is an agency of the State of New Mexico, duly established by § 68-4-1, N.M.S.A., 1953 (Appendix C, p. 55), and charged with the supervision and regulation of public utilities rendering electric service to or for the public, including corporations organized under the New Mexico Rural Electric Cooperative Act, all in accordance with the provisions of the New Mexico Public Utility Act, as amended by Chapter 89 of Laws 1961. (R. 58)

Respondent, Community Public Service Company, hereinafter called "Community," is an investor owned corporation which owns and operates plant and facilities for the rendering of electric service to the public generally in Lincoln County, holding a franchise therefor and at all times material hereto has been a public utility within the meaning of the Public Utility Act, as amended. (R. 56, 284, 321)

The controversy arose under the following circumstances: In April, 1963, Community formally notified the Commission of a proposed extension of its existing facilities, which entailed the construction of a distribution line to serve a new subdivision in Lincoln County, which had not theretofore been receiving electrical service. Otero objected to this extension on the grounds that its electrical facilities were near this subdivision and were adequate to render the needed service, and that the proposed extension of Community would unreasonably interfere with Otero's existing plant, facilities, lines and system. Thereafter, following hearing in the matter, the Commission entered its Opinion and Order granting a certificate of public convenience and necessity to Oero tp serve the subdivision and enjoining Community from constructing facilities to render service in the area in question.[3] (R. 19-26, 57-58,

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[3] The record is devoid of any testimony that Otero was not acting, in fact, as a public utility in the same manner as Community in serving the public generally. The trial court found that Otero "renders electric service to its members and other persons in the Lincoln County and elsewhere in New Mexico." (R. 55) The uncontradicted testimony is that, if certificated for the subject sub-division, Otero would provide service within ten days after request, no distinction or reservation being made whether the consumer be a member of the cooperative or within a ten percent figure of membership (R. 227), and that Otero was "ready, willing and able to service" the subdivision. (R. 208)

244-248, 296-297) The constitutional issue hereinabove stated was raised by Community before the Commission (R. 95-97, 232-233) and in statutory review proceedings before the District Court, Lincoln County, State of New Mexico (R. 11-12, 50-51). In the statutory review proceedings before the trial court, the order of the Commission was affirmed in all respects (R. 60) and the above constitutional issue resolved against Community. (R. 59)

Community took an appeal to the Supreme Court of New Mexico. (R. 65) The sole points relied upon for reversal in the Supreme Court of New Mexico were constitutional, to-wit: Laws 1961, Chapter 89 unconstitutionally deny Community due process of law if a cooperative is included as a public utility irrespective of its duty to serve the public (R. 277) and, second, said laws constitute an arbitrary and unreasonable classification and deny Community due process of law and equal protection of the laws. (R. 278) The Supreme Court of New Mexico reviewed only the second constitutional attack[4] and expressly refrained from considering the first ground relied upon for reversal.[5]

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[4] The Supreme Court of New Mexico stated (R. 395-96):

> "Community here appeals from a district court judgment affirming an order of the Commission in a proceeding under §§ 68-9-1 to 68-9-5, N.M.S.A., 1953, wherein the Commission granted a certificate of public convenience and necessity to Otero to serve the Sun Valley Subdivision near Alto, New Mexico. Community timely raised the constitutional issues, and here appeals from the decision of the trial court upholding the statute. It argues that the 1961 amendment is void because it constitutes an arbitrary and unreasonable classification. It asserts that this is so because cooperatives are included under the Act though not required to render service to the general public and no provision is made for complete regulation of rates charged by them (§ 68-5-4.1, N.M.S.A., 1953) or securities issued by them (§ 68-5-8, N.M.S.A., 1953), whereas Community must render service to the public generally and its rates and financing are completely supervised and controlled. On the other hand, Otero is here asserting that it is a public utility and accordingly entitled to the protection of the act; and, further, that the special privileges accorded in §§ 68-5-4.1 and 68-5-8, supra, are based upon a reasonable classification."

and held (R. 400)

The Public Utility Act was initially enacted by the Legislature in 1941 and recognized several sub-classes of electric service purveyors. One such sub-class of the electric industry recognized since 1941 in the Public Utility Act was the purveyor of electric service "organized under Laws 1939, Chapter 47, known as the Rural Electric Cooperative Act."[6] This member of the electric service industry was excluded from Commission regulation. (Section 68-3-3, N.M.S.A., 1953; Appendix C. pp. 54-55) The Rural Electric Cooperative Act was enacted in 1939 to enable the formation of "cooperative, non-profit, membership corporations" for the purpose of accepting loans under the Federal Rural Electrification Act (7 U.S.C. § 901 et seq.) in order to supply electric energy and promote and extend the use thereof in rural areas of New Mexico. (§ 45-4-2, N.M.S.A., 1953) The enabling legislation granted the cooperatives, including Otero, the powers necessary to carrying out its pur-

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> "We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18 of the New Mexico Constitution."

[5] The Supreme Court of New Mexico stated (R. 400-01):

> "Having concluded that the questioned legislation must be held invalid as violative of the Constitutions in the manner hereinabove discussed, it is not necessary for us to consider the additional grounds of unconstitutionality argued by Community in its brief."

[6] Second, the Public Service Commission was given general and exclusive regulatory jurisdiction over the rates, service, and securities of the investor owned and operated electric system (§ 68-5-4, N.M.S.A., 1953; Appendix C, pp. 59-60). Third, the municipally owned and operated system, since the consumer was, in effect, the investor and, through the elective franchise, the manager, was given the local option of coming under the provisions of the Public Utility Act. (§ 68-5-5, N.M.S.A., 1953; Appendix C, pp. 60-62). Fourth, the electric companies subject to the jurisdiction of the State Corporation Commission under Article XI, Section 7 of the Constitution of New Mexico were recognized as a separate class and excluded from the provisions of the Public Utility Act. (§ 68-3-3, N.M.S.A., 1953; Appendix C, p. 55). It may be that telephone companies would be in this classification. See *Mountain States Tel. & Tel. Co. v. Town of Belen,* 56 N.M. 415, 244 P. 2d 1112 (1952); *City of Roswell v. Mountain States Tel. & Tel. Co.,* 78 F. 2d 379 (10th Cir. 1935).

pose, limiting its service to rural areas and to servicing of persons other than its members, governmental agencies and political sub-divisions to a number not in excess of 10% of its members. (§§ 45-4-3, 45-4-31, N.M.S.A., 1953; Appendix D, pp. 86-88, 106-07) Its members are users of its electric energy, its business and affairs, including rates, are managed by a board of trustees who must be members and are subject to additional membership control by initiative. (§§ 45-4-8, 45-4-9, 45-4-17, N.M.S.A., 1953 Comp.; Appendix D, pp. 89-91, 98). The rates of a cooperative, including Otero, are subject to approval by the Federal Rural Electrification Administration (R. 216-17) and to patronage refunds of revenue in excess of fiscal needs. (§ 45-4-20, N.M.S.A., 1953; Appendix D, pp. 102-03).

By the late 1950's there were extensive electric systems in operation by each the private and cooperative electric company and in many areas of New Mexico the lines and systems of such sub-classes were already intertwined and intermingled. This unnecessary duplication and economic waste between the expanding systems of the private and cooperative electric companies inevitably leads to higher cost to the consumer, to lower return to the investor-owner, to discouragement of future investment in expansion and in improvement of service and to the practical frustration of the Commission. In 1959 the Supreme Court of New Mexico, however, determined that the Commission could not prevent unnecessary duplication between an investor owned electric company and rural electric cooperative, since the latter was not a "public utility."[7] Following this decision, the public and each of the above subclasses of the electric service industry were without administrative protection against unnecessary duplication and economic waste, and the problem was presented to the New Mexico Legislature in 1961.

The Legislature in 1961 chose to retain the legislative classification between the private and cooperative company, but to overrule the above 1959 Supreme Court of New Mexico decision by defining the cooperative as a public utility and bringing the cooperative within the jurisdiction of the Commission sufficiently to achieve its goal.[8] Chapter 89 of Laws 1961 resulted, which, briefly, did the following:

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[7] *Socorro Electric Coop., Inc. v. Public Service Co.,* 66 N.M. 343, 348 P. 2d 88.

Section 1 inserted the words "without unnecessary duplication and economic waste" in the preamble of the Public Utility Act (§ 68-3-1(B)), setting forth the legislative intent. (Appendices B, pp. 44-45 and C, p. 52)

Section 2 amended § 68-3-2(F) (1) to add the rural electric cooperative as a defined "public utility." (Appendices B, pp. 45-47 and C, p. 53)

Section 3 amended § 68-3-3 to delete the former exemption from the Commission's jurisdiction for the rural electric cooperative. (Appendices B, p. 47 and C, p. 55)

Section 4 amended § 68-5-8, which provided for the exemption of certain securities of utilities otherwise subject to Commission supervision in order to add an additional exemption, available to any utility, for securities to the United States or any agency or instrumentality thereof. (Appendices B, pp. 47-48 and C, p. 63)

Section 5 enacted a new § 68-5-4.1 which granted the Commission jurisdiction over the cooperative's rates in two instances; i.e., general rate jurisdiction in an overlap or conflict area with a private utility and jurisdiction to consider the reasonableness of a cooperative's rates in determining Commission action in granting or denying certification or enjoining unreasonable interference between competing systems. (Appendices B, p. 48 and C, p. 60)

Section 6 deleted the requirement of § 68-7-4 for an applicant for a certificate of public convenience and necessity to show it holds a franchise other than a municipal franchise. (Appendices B, pp. 48-49 and C, p. 73)

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[8] The Supreme Court of New Mexico stated concerning the *Socorro* case (76 N.M. at , 414 P. 2d at 677; Appendix A, p. 38; R. 396):

> "In the light of this decision, it seems fairly evident that by Ch. 89, N.M.S.L. 1961, and particularly by the amendment to § 68-3-2(F) (1), supra, it was the purpose of the legislature to overrule this court and make rural electric cooperatives into public utilities. That the legislature could accomplish this purpose, Community does not question. * * *"

Section 7 amended § 68-6-8 to make the Commission regulatory fee then applicable to the private company equally applicable to the electric cooperative. (Appendices B, pp. 49-50 and C, p. 71)

Section 8 enacted a new § 68-7-1.1 to provide for certification for the electric cooperative and to retain the status quo and freeze in the private company in "grandfathered" areas in which there existed duplicative services. (Appendices B, pp. 50-51 and C, p. 72)

Section 9 enacted a new § 68-6-3.1 allowing the Commission to adopt regulations relating to the filing with it by rural electric cooperatives of information relating to rates and service. (Appendices B, p. 51 and C, p. 68)

While defining the rural electric cooperative as a public utility, Laws 1961, Chapter 89 did not exempt the rural electric cooperative from any of the following material duties applicable to all utilities, to-wit:

1. Rate regulation, except, in effect, where no competition with a private company is involved. (§§ 68-5-4.1, 68-6-1, 68-6-3.1, 68-6-4 to 68-6-7, N.M.S.A., 1953; Appendix C, pp. 60, 68-71)

2. Security regulation. (§§68-5-6 to 68-5-11, N.M.S.A., 1953; Appendix C, pp. 62-64)

3. Service standards, safety rules, reports, valuation, consolidation control. (§§ 68-5-12 to 68-5-24, 68-6-2, 68-6-5, 68-6-6, N.M.S.A., 1953; Appendix C, pp. 64-69)

4. Franchise regulation. (§§ 68-7-1 to 68-7-4, N.M.S.A., 1953; Appendix C, pp. 72-74)

5. Hearings, Orders, Review. (§§ 68-8-1 to 68-8-16, 68-9-1 to 68-9-7, 68-10-1 to 68-10-7, 68-11-1 to 68-11-5, N.M.S.A., 1953; Appendix C, pp. 74-85)

THERE ARE SPECIAL AND IMPORTANT REASONS FOR THE ALLOWANCE OF THE WRIT

I.

The Issue Is a Matter of Grave Concern

Whether Laws 1961, Chapter 89 is violative of the Fourteenth Amendment to the Constitution of the United States presents an issue far greater than whether Otero or Community should be certificated to serve a small sub-division near Alto, New Mexico. The petitioners and the respondent are merely each representative of two sub-classes of the electric service industry—the private and cooperative[9] enterprise—and of the public of the State of New Mexico, each of which are vitally interested in the providing of reasonable and proper services at fair, just and reasonable rates through proper non-duplicative plants and facilities. That interest is manifest in the declared policy of the State of New Mexico, to-wit:

> "Declaration of policy.—A. Public utilities, as defined in section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation, are affected with the public interest in that, among other things,
>
> (1) a substantial portion of their business and activities involves the rendition of essential public services to large numbers of the general public,
>
> (2) their financing involves the investment of large sums of money, including capital obtained from many members of the general public, and
>
> (3) the development and extension of their business directly affects the development, growth, and expansion of the general welfare, business and industry of the state.
>
> B. It is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of

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[9] The New Mexico Rural Electric Co-op Association and thirteen individual rural electric cooperatives appeared as amici curiae before the Supreme Court of New Mexico. (R. 402, 426, 429-78, 479-98)

> such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without necessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry." (§ 68-3-1, N.M.S.A., 1953)

If, in view of the inherent differences between the private and cooperative company, the New Mexico Legislature cannot constitutionally regulate the cooperative company sufficiently to prevent wasteful duplication of services, the public interest, the interest of consumers and the interest of investors will undeniably suffer. The question of the constitutionality of Laws 1961, Chapter 89 is, therefore, not limited to the parties hereto, but has the utmost impact over the entire breadth and width of New Mexico, and, indeed, beyond her borders.

This Court has upon past occasion upheld the importance of Federal participation in electric service, both directly and by loans. See, e.g., *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939); *Duke Power Co. v. Greenwood County*, 302 U.S. 485 (1938); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The Congressional purpose in favor of promoting the electrification of rural areas, as by Otero and the other rural electric cooperatives in New Mexico, is undeniably contained in Title I of the Rural Electrification Act of 1936. (7 U.S.C. §§ 901-14). The very plant and system sought to be protected by Otero is underwritten by loans from the Rural Electrification Administration pursuant to that Act, and the REA's substantial investment in the extensive rural electric cooperative electric systems in New Mexico, secured by the plant and facilities of Otero and similarly situated cooperatives, is at peril in the resolvement of the substantial constitutional issue at bar.[10]

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[10] According to the Quarterly Statistical Summary for the Rural Electrification Program published by the Rural Electrification Administration of the United States Department of Agriculture, No. 289 (March 1966), eighteen cooperatives organized under the New Mexico

The Suppreme Court of New Mexico questioned the validity of Laws 1961, Chapter 89 primarily upon this Court's opinion in *Frost v. Corporation Commission*, 278 U.S. 515 (1929) (R. 399-400). Petitioners submit that such precedent was misapplied to the case at bar and the decision and judgment of the Supreme Court of New Mexico has decided this federal question of substance in a way not in accord with applicable decisions of this Court.[11]

II.

Different Treatment Is Based On Real Differences and the Abuse Sought to Be Regulated.

Petitioners submit that Laws 1961, Chapter 89 recognized the existing sub-class of the electric service industry applicable to rural electric cooperatives and, such classification being based on real differences bearing a proper relationship to the classification, the different treatment accorded Community under the Public Utiity Act, as amended by Laws 1961, Chapter 89, from that accorded Otero does not constitute invidious discrimination prohibited by the Fourteenth Amendment to the Constitution of the United States and by Article II, Section 18 of the Constitution of New Mexico.[12] This result must follow from the unbroken precedents of this Court.

Rural Electric Cooperative Act, including Otero, have outstanding loans from the Rural Electrification Administration in the amount of $111,480,236.00 in order to build 26,528 miles of line to serve 77, 328 consumers.

[11] (R. 399-400). The New Mexico Supreme Court also alluded to *Morey v. Doud*, 354 U.S. 457 (1957) and *Chickosha Cotton Oil Company v. Cotton County Gin Company*, 40 F. 2d 846 (10th Cir. 1930) which petitioners also submit were misapplied.

[12] The cited New Mexico constitutional provision is the same as the Fourteenth Amendment. See p. 3, supra, and footnote 2 on p. 2, supra. While certain New Mexico authorities were cited for the principles of equal protection, the Supreme Court of New Mexico first determined Laws 1961, Chapter 89 to be violative of the Fourteenth Amendment, upon the basis of the *Frost* case, and, after such a determination of the Federal constitutional provision, determined the 1961 amendments violative of the State constitutional provision, since it is the same as the United States constitutional provision (R. 398-400).

The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.[13] Equal protection permits practical inequalities and narrow distinctions, and "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it."[14] Considerable latitude must be given to the New Mexico Legislature in adopting classifications to deal with different degrees of regulatory need.[15]

As observed in the Statement of the Case, supra, the private electric company and rural electric cooperative were recognized since the inception of public utility regulation in New Mexico as separate reasonable classification and Laws 1961, Chapter 89 were adopted by the New Mexico Legislature to overturn a decision of the Supreme Court of New Mexico which denied the electric service industry and the people of New Mexico protection from wasteful duplication of utility plant and system. Though the legislation did not regulate the rates and service of the rural electric cooperative in situations where the private company was unaffected and the evil of duplication is non-existant, it admittedly regulated the abuse which it found in the duplicative situation.

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[13] *Tigner v. Texas,* 310 U.S. 141 (1940). See also, *McGowan v. State of Maryland,* 366 U.S. 420, at 425-26 (1961) for a restatement of the standards under which an argument of denial of equal protection is to be evaluated:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. [Citations omitted.]"

[14] *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959); *New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938).

[15] *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942); *Whitney v. People of State of California,* 274 U.S. 557 (1927).

Equal protection must be judged by practical considerations based on experience and does not require that all evils of the same genius be eradicated or none at all.[16] The New Mexico Legislature "is entitled to hit the evil that exists."[17] The Legislature may classify the objects of its regulation to those classes of cases where the need is deemed to be clearest, even though the regulation could have been carried further.[18]

Within these guidelines, Laws 1961, Chapter 89 is eminently sound. § 1 amended the preamble[19] to make clear the abuse sought to be eradicated—wasteful duplication, and the Legislature accomplished the objective by first defining the cooperative as a utility[20] and deleting the exclusion of cooperatives from any Commission regulation whatsoever as contained in the Public Utility Act since its enactment.[21] Community had no objection to such inclusion in and of itself.[22] Because of these changes, Otero assumed two burdens and Community obtained two advantages material at bar. Under § 68-7-1, N.M.S.A., 1953 (Appendix C, p. 72), Otero henceforth had to obtain Commission permission before undertaking construction of plants, lines and system, such as the construction here in question, and extensions were subject to Commission action to enjoin unreasonable interference with the plant, lines and systems of other utilities, including that of Community.[23]

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[16] *Railway Express Agency v. People of State of New York*, 336 U.S. 106 (1949); *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912).

[17] *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[18] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[19] Appendices B, pp. 44-45 and C, p. 52.

[20] Laws 1961, Chapter 89, § 2, Appendices B, pp. 45-47 and C, p. 53.

[21] Laws 1961, Chapter 89, § 3; Appendices B, p. 47 and C, p. 55.

[22] R. 396; Appendix A, p. 38.

[23] The Supreme Court of New Mexico, however, cited as its first of three examples of differences in treatment that by reason of the inclusion of Otero as a public utility " . . . there arose a duty not previously present under [§ 68-7-1] for Community to obtain a permit before undertaking the construction here in question. . . ." (R. 397-98, Appendix A, pp. 39-40) While this is true, it is equally true that Otero must bear the same burden. Although this parity of treatment will be

Upon thereby including the cooperative as a utility within the full jurisdiction of the Commission and subject to all the benefits and burdens of the Public Utility Act, the Legislature, in recognition of the inherent differences between the private and cooperative electric company, then sought to eliminate Commission regulation of the cooperative where deemed unnecessary to rectifying the abuse at hand.

The Legislature provided:

> "68-5-4.1. No jurisdiction in public service commission over rates of rural electric co-operatives—Exceptions.—The public service commission shall have no jurisdiction over rates charged by utilities organized under sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, known as the Rural Electric Co-operative Act, except in any territory in which an overlapping or conflicting certificate of convenience and necessity has been issued to and exercised by any other public utility for the same class of service; Provided that, except as provided in section [68-7-1.1, Appendices B, pp. 50-51 and C, p. 72], nothing in this section shall be construed to prohibit the public service commission from inquiring into the reasonableness of the rates of any public utility in connection with any application for the granting or extension of any certificate of convenience and necessity or in connection with any complaint of a public utility of present or threatened unreasonable interference with its service or system."[24]

Although the provision again returned to the long existing legislative classification as between the private and cooperative electric company, the provision's exception vested in the Com-

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discussed more fully, infra, it is mentioned here because it was cited as the first example of discriminating treatment and, in truth and fact, such reciprocal duty did not impose unequal duties and burdens and is not a discriminating feature upon which invalidity can be predicated. The purpose of this new requirement upon both Otero and Community was, of course, to give the Commission the method of preventing unnecessary duplication and economic waste between the extensions of service of both the private and cooperative utility.

[24] Laws 1961, Chapter 89, Section 5; Appendices B, p. 48 and C, p. 60.

mission general jurisdiction over Otero's rates in the overlap or conflict situation and the proviso allows the Commission to consider the reasonableness of Otero's rates in granting or denying certification or in granting or denying injunctive relief against unreasonable interference. The legislature thereby achieved its stated purpose of protecting against wasteful duplication, for the Commission acquired jurisdiction, previously non-existent, to regulate Otero's rates in the only situations in which Otero may come into competition with Community. The fact that the Legislature did not go further and regulate Otero's rates in other, non-duplicative situations does not impinge upon the constitutionality of the classification, for, as observed, the Legislature had no duty to proceed further and was entitled to meet the most immediate regulatory need it foresaw.

The Supreme Court of New Mexico cited such limited rate regulation as the second instance of unconstitutional discrimination.[25] Though admittedly different treatment between the cooperative and private electric company thereby existed, the different treatment limited to the abuse of duplication is reasonable and based on real differences between Otero and Community and to the legislative need.

The private company does not necessarily have consumers managing its affairs and public welfare requires that the Commission be the representative of the consumer-public in regulating its rates. It is managed by a board of directors, usually consisting of stockholders who may or may not be consumers of the company's electric service. Profits of the private company may, but are not required to, be currently paid out in dividends to stockholders who may or may not be consumers. Since there is no self-regulation of rates inherent in the private company, regulation for the protection of its consumers is required.

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[25] "Section 68-5-4.1, supra, denies the Commission jurisdiction over the rates of cooperatives such as Otero 'except in any territory in which an overlapping or conflicting certificate of convenience and necessity has been issued to and exercised by any other public utility. . . . ' At the same time the Commission has 'general and exclusive popwer and jurisdiction to regulate and supervise . . . rates and service regulations. . . .' of Community. § 68-5-4, N.M.S.A., 1953." (R. 398; Appendix A. p. 40)

In direct contrast, the cooperative has both inherent self-regulation of rates and Federal supervision. Otero's rates were passed upon by both its Board of Trustees and by the Rural Electrification Administration, the latter Federal agency having final approval over its rates. (R. 216-17) Each member of its Board of Trustees must also be a member-consumer. (§§ 45-4-8, 45-4-9, N.M.S.A., 1953; Appendix D, pp. 89-91) At least 90% of its non-governmental consumers must be members. (§ 45-4-3, N.M.S.A., 1953, Appendix D, p. 86) Except as the consumer directs otherwise, revenue in excess of working capital is distributed to the consumers. (§ 45-4-20, N.M.S.A., 1953; Appendix D, pp. 102-03) The consumer is thus, in the cooperative, the regulator of his own rates, without the necessity of Commission intervention,[26] and with the overall supervision of the United States Government. These are basic, real and substantial differences, bearing a proper relation to the regulatory need, justifying the limiting of Commission rate regulation to the duplicative situation affecting the private sector of the electric service industry.

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[26] A fundamental characteristic of the cooperative organization is democratic ownership and control. *Keystone Automobile C. Cas. Co. v. Commissioner of Int. Rev.,* 122 F. 2d 886 (3rd Cir. 1941), cert. den., 315 U.S. 814 (1942). In his dissenting opinion in *Frost,* supra, Mr. Justice Brandeis pointed out that the aim of a cooperative is "economic democracy on lines of liberty, equality and fraternity."

> "Under the concepts of Anglo-American law, the owner of a corporate undertaking is said to be the corporation. The convenience of stating all the consequences of compliance with an incorporation statute, in terms of a fictitious person justifies the fiction so long as the basic facts underlying the fiction are not overlooked. As to a cooperative, it will be shown that it is particularly important to remember that the association is an organization of individuals rather than a mere abstract and impersonal entity.
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> "The personal character of the ownership in a cooperative is one of the main distinctions between the cooperative and the ordinary corporation." Packel, *The Law of Cooperatives* (1940) p. 68.
>
> "* * * The personal character of the ownership of the cooperative . . . would of itself tend to personal control over the cooperative. Much more important, however, is the general cooperative principle of 'one person one vote'." Packel, supra, pp. 85-86.

The remaining provisions of Laws 1961, Chapter 89 were not held by the Supreme Court of New Mexico to be unconstitutionally discriminatory. These provisions included securities of the United States in an existing list of exempted securities,[27] eliminated the requirement of a county franchise,[28] extended the existing regulatory fee to cooperatives,[29] provided for the certification of cooperatives without disturbing existing service by private electric companies[30] and allowed the Commission to require the cooperative to file information relating to rates and service.[31]

The third and last discrimination questioned by the Supreme Court of New Mexico is that while Community has the duty to serve the public generally, Otero's power to serve persons other than its members and governmental agencies and subdivisions is limited to 10% of the number of its members. (R. 398; Appendix A, p. 41)[32] The restriction, if it be a restriction in fact or law,[32] is well founded upon the basic distinction that private companies usually give priority in serving urban areas, while the cooperatives are restricted by the Rural Electric Cooperative Act to serve only in rural areas and are consumer formed for this particular purpose. The electric service gratefully received by thousands of New Mexico residents of rural areas, beginning in the Depression, is witness to this distinction.

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[27] Laws 1961, Chapter 89, § 4, Appendices B. pp. 47-48 and C, p. 63. Though argued by Community as discriminatory (R. 396), the Supreme Court of New Mexico noted no objection. The provision applies to all utilities alike and discriminates neither in favor of or against any party hereto. Any utility, without designating between sub-classes, may issue evidences of indebtedness to Federal authorities without Commission approval. Although Otero is a recipient of a loan from the Rural Electrification Administration covered thereby, Community could be a recipient of such loan. 7 U.S.C. § 904.

[28] Laws 1961, Chapter 89, § 6; Appendices B, pp. 48-49 and C, p. 73. This pertains to all utilities alike. In fact, this did not change the requirements for operation of a cooperative, as the municipal franchise was a requirement by the first proviso clause of § 45-4-31, N.M.S.A., 1953 (Appendix D, pp. 106-07).

[29] Laws 1961, Chapter 89, § 7; Appendices B, pp. 49-50 and C, p. 71. The revenue raised by such inclusion increases the general fund of the State of New Mexico by almost $75,000.00 per annum, and Otero and other cooperatives have willingly paid the same fee required of Community and the private companies, despite Community's protestation that the Commission does not exercise mathematically equivalent authority over the cooperatives in all respects.

[30] Laws 1961, Chapter 89, § 8; Appendices B, pp. 50-51 and C, p. 72. The Supreme Court of New Mexico recently held that this provision allowed the private company to continue existing service even where duplication does exist, in *New Mexico Electric Service Company v. Lea County Electric Coop., et al,* 76 N.M. ...., 415 P. 2d 556 (1966).

This difference in fact between the rural electric cooperative and the private electric company is well recognized in law. For example, the Rural Electrification Act of 1936 authorizes loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service."[33] The stated purpose of the Rural Electric Cooperative Act, under which Otero has been formed, is "for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas." (§ 45-4-2, N.M.S.A., 1953; Appendix D, p. 86) The basic differing purposes of these two separate members of the electric service industry, then, gives

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[31] Laws 1961, Chapter 89, § 9; Appendices B, p. 51 and C, p. 68. This provision is even more extensive than § 68-6-3, N.M.S.A., 1953 (Appendix C, p. 68), applying to Community.

[32] The service limitation of cooperatives is to be found not in the Public Utility Act, but in the Rural Electric Cooperative Act, § 45-4-3(d), N.M.S.A., 1953 (Appendix D, p. 86). When the definition of "public utility" was amended, no exception was made elsewhere in the Public Utility Act for the cooperatives from the duty to service the public generally, and amici curiae, on motion for rehearing, argued that the latter legislation controlled over the earlier Rural Electric Cooperative Act, and the service restriction as contained in the enabling legislation was repealed by implication (R. 462-63); the Supreme Court of New Mexico did not expressly pass upon the contention. In addition, as noted in Statement of the Case, there is nothing to indicate but that Otero in fact was serving the general public in the same manner as Community. Page 4, supra, footnote 3.

[33] 7 U.S.C. § 904. See *Missouri Power & Light Co. v. Lewis County Rural Electric Co-op. Ass'n.*, 235 Mo. App. 1056, 149 S. W. 2d 881

rise to a basis for classification for different treatment under the law.[34]

In *Kotch v. Board of River Port Pilot Com'rs.*, 330 U.S. 552, at 556 (1947), Mr. Justice Black set forth the rule that discrimination is implicit in regulation and such discrimination

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(1941). 6 C.F.R., § 200.1 provides that REA loans, of which Otero is a recipient, "are made to finance the construction and operation of generating plants, electric transmission and distribution lines and systems to provide initial and continuing electric service to persons in rural areas." Otero is restricted to service in rural areas, as defined in § 45-4-31, N.M.S.A., 1953 (Appendix D, pp. 106-07).

[34] The actual percentage figure for non-member service is that originally recommended by the Rural Electrification Administration to insure that the recipients of its loans remained tax exempt under 26 U.S.C. § 521.

Other differences were pointed out to the Supreme Court of New Mexico, as follows (R. 415-16):

"1. (a) Private companies generally serve in the urban areas although they may go into the rural areas.
   (b) Cooperatives are restricted by law to serve only in rural areas.

2. (a) Private companies which generally serve in the urban areas have a national average of 33 customers per mile of line.
   (b) Cooperatives being restricted by law to the more sparsely settled rural areas have a national average of 3.4 customers per mile of line.

3. Due to lack of density in rural areas, the cooperatives' cost of service and rates are well nigh universally higher and they cannot economically compete with the private companies.

4. (a) Private companies are managed by a board of directors consisting of stockholders who may or may not be consumers of their own company.
   (b) Cooperatives are governed by a board of trustees, all of whom are members of the cooperative.

5. (a) Any profits generated by the business of the private company are paid out in dividends to stockholders who are not necessarily consumers.
   (b) Any moneys received by the cooperative in excess of the cost of obligations and debt [service] are returned to the consumers on a patronage basis.

6. (a) Private companies are financed in the private money market. Such financing is limited by the Commission on

is not necessarily invalid under the equal protection clause when related to the regulatory objective, stating:

> "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See, e.g. Tigner v. State of Texas, 310 U.S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124, 130 A.L.R. 1321. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation

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the grounds that the consumer is entitled to be protected against unreasonable financing charges and against unreasonable and uneconomic investments and extensions.

(b) The cooperatives are financed through loans from the Rural Electrification Administration. The REA, as Banker, through its engineering and financial staff, passes upon the economic feasibility of the loan before it is made, making it unnecessary that a state regulatory body take a second look.

7. (a) Rates of the private companies are regulated by the regulatory body, created not for the protection of the compapny but for the protection of consumers against unreasonable rates and profits, while

   (b) rates of cooperatives are fixed by the consumer himself through its board of trustees and are fixed on such basis as to provide sufficient revenue for actual costs of operation plus debt repayment, and the legislature considered it was not necessary that the Commission regulate rates except where there were overlapping certificates.

8. (a) Private companies are required to extend service only where it will result in a profit, and are not required by the regulatory body to extend service to marginal or unprofitable loads.

   (b) Cooperatives are bound by their loan contracts with the REA to a policy of area coverage, that is to serve everyone within the geographical area in which they undertake to operate."

> might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 106, 19 S. Ct. 609, 613, 43 L. Ed. 909. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. * * *."

There may be classification among corporations[35] and corporations furnishing the same type of service may be subject to different type of regulation without falling afoul of the Equal Protection Clause.[36]

This Court has aptly noted that

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way." *Dominion Hotel v. State of Arizona,* 249 U.S. 265, (1919)[37]

This Court has significantly recognized the reasonable separate classification of cooperatives and other self consumers in *German Alliance Ins. Co. v. Lewis,* 233 U.S. 389 (1914); *Liberty Warehouse Co. v. Burley Tobacco G. Co-op. M.A.,* 276 U.S. 71

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[35] *Metropolitan Casualty Ins. Co. v. Brownell,* 249 U.S. 580 (1935); *People v. Zimmerman,* 278 U.S. 63 (1927).

[36] *Spoles v. Binford,* 286 U.S. 374 (1932); *Western U. Teleg. Co. v. Commercial Mills Co.,* 218 U.S. 406 (1910); *Engel v. O'Malley,* 219 U.S. 218 (1911); *Provident Inst. for Sav. v. Malone,* 221 U.S. 660 (1911).

[37] Even *Morey v. Doud,* 354 U.S. 465 (1957), cited by the New Mexico Supreme Court (R. 399; Appendix A, p. 41), admitted:

> "That the Equal Protection Clause does not require that every state regulatory statute apply to all in the same business is a truism," and "distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved."

(1928); and *American Sugar Refining Co. v. Louisiana,* 179 U.S. 89 (1900).[38]

If the Legislature focused upon the problem of duplication, rather than overall regulation of electrical cooperatives, this is because, as shown by the 1961 amendment to the statement of legislative policy, this was the evil which it sought to prevent, and classification of electric cooperatives to achieve this limited regulation cannot be questioned, even though the Supreme Court of New Mexico may question the legislative wisdom in not regulating cooperatives concerning rates in other than duplicative circumstances. Mr. Justice Douglas, in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, at 489 (1955), stated:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. State of Texas, 310 U.S. 141, 60 S. Ct. 879, 84 L. Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Sember v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A. F. of L. v. American Sash Co., 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

It cannot be said that point has been reached here. For all this record shows, the problem of duplication between the cooperative and private electric company looms larger than rate and service regulation problems in other than duplicative circumstances and presents problems of regulation distinct from the non-duplicative situation.

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[38] See also, *Keystone Automobile C. Cas. Co. v. Commissioner of Int. Rev.* 122 F. 2d 886 (3rd Cir. 1941), cert. den., 3315 U.S. 814 (1942). Numerous state decisions supporting a separate classification for electric cooperatives are collected in Otero's Brief in Support of Motion for Rehearing, R. 412-13.

It is thus that the instant legislation must be sustained, for to the limited extent that the 1961 amendments to the Public Utility Act retained the long recognized classification between private and cooperative electric companies, the classification was reasonable, well suited to the legislative intent to remedy the most immediate evil and based on real differences having a proper relationship to the classification. This result is reached upon authority of this Court, with which the judgment and opinion of the Supreme Court of New Mexico is not in accord.

III.

Community Was Accorded Parity of Treatment

Above was demonstrated that the different treatment for private vis-a-vis cooperative electric companies, cited by the Supreme Court of New Mexico herein, was within the proper exercise of legislative classification. The petitioners respectfully submit, however, that the judgment and opinion lacked clarity as to whether the constitutional objection was based upon an alleged improper exercise of legislative classification, which has been dealt with above, or upon the premise that the private electric company and rural electric cooperatives were, by Laws 1961, Chapter 89, placed in the same class, in which there must be uniformity of treatment upon all members. Assuming *arguendo* that the Legislature in enacting Laws 1961, Chapter 89 departed from the previously recognized separate classification for the private and the cooperative electric company and made them within one classification, equality of treatment was accorded.

Even within the same classification, Equal Protection does not, though, require exact equality. The rough accommodations made by government to solve practical problems do not necessarily violate the Equal Protection Clauses. *Norvell v. State of Illinois,* 373 U.S. 420 (1963). And, Laws 1961, Chapter 89, does not have to be considered by itself in testing its constitutionality. Reference may be made to kindred acts. *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1932) stated:

> "The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. * * * ".

Let us now proceed to consider Laws 1961, Chapter 89 itself to see how it operates as to private and cooperative electric companies. Since each section of Laws 1961, Chapter 89 has been previously analyzed, only brief discussion will suffice to conclude its parity of treatment.

Section 1,[39] amending the preamble and setting forth the purpose of encouraging the development of electric systems "without unnecessary duplication and economic waste" should, of course, not be in issue, as it does not discriminate in any manner between the private and cooperative enterprise, but would benefit both as well as the consumer of each's service.

Section 2[40] amends the definition of "public utility" to include the rural electric cooperative. It resulted in all the general statutes relating to public utilities being applicable to cooperatives, with the single exception that rate regulation is to be limited to duplicative situations, as discussed infra. Section 3[41] deleted the express exclusion formerly in § 68-3-3 (Appendix C, p. 55). The advantages and burdens with the one exception just noted, then became applicable to both the private and cooperative comppany. One such burden applicable to *both* companies was the obligation to become certificated before proceeding with the construction here involved. § 68-7-1. Other duties and responsibilities becoming equally applicable to Otero and Community are found in Chapter 68, Article 5.[42]

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[39] Appendices B, pp. 44-45 and C, p. 52.

[40] Appendices B, pp. 45-47 and C, p. 53.

[41] Appendices B, p. 47 and C, p. 55.

[42] Appendix C,pp. 59-68.

By recognition of the public utility status of the cooperative, the cooperative and investor company achieved parity of treatment non-existent prior to the 1961 legislation. To the extent that the restriction on service by the cooperative under § 45-4-3 (d) (Appendix D, p. 86) is inconsistent with such equal treatment, as pointed out, the testimony does not warrant any conclusion other than Otero served the public generally. If the limitation prevails, moreover, petitioners can conceive of no adverse consequence to a private electric company. If the cooperative cannot compete for service outside of the limitations set forth in the Rural Electric Cooperative Act (Appendix D), the law of supply-and-demand would give the private electric company a decided advantage. The limitation, certainly, gives Otero no competitive advantage over Community.

Section 4[43] added to the existing category of securities exempt from Commission regulation evidences of indebtedness to the Federal Government and its agencies. The provision applies alike to all utilities and discriminates against no one. Community, as well as Otero, could avail itself of the benefit of such exemption.[44]

Section 5 enacted present § 68-5-4.1.[45] This provision, indisputably, gave the Commission jurisdiction to regulate cooperative rates "in any territory in which an overlapping or conflicting certificate of convenience and necessity has been issued to and exercised" by a private electric company. Certainly, to this extent, there is equality of treatment. The proviso clause, moreover, provides that the reasonableness of a cooperative's or of a private company's rates may be determinative of Commission action in granting or denying certification, or in enjoining unreasonable interference, under § 68-7-1, (Appendix C, p. 72). Thus, in the duplicative situation, or in applying for permission to provide new service, the Commission may consider the reasonableness of the rates of each the private and cooperative company before granting or denying the relief sought. Assuming each to be the same class, all members of the class have been accorded equal treatment.

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[43] Appendices B, pp. 47-48 and C, p. 63.

[44] 7 U.S.C. § 904.

[45] Appendices B, p. 48 and C, p. 60.

This leaves only one area within Section 5 open for a claim by Community of unequal treatment, i.e., the situation in which the private company is not in competition with the cooperative and the situation which is not even claimed to exist in the case at bar: where there is no conflict or overlap, or the cooperative or private electric system is not seeking affirmative Commission relief under § 68-7-1. In this abstract and hypothetical situation, there is, however, no disparity of treatment between the cooperative and private company, for both are subject to general rate regulation, albeit by differing representatives of the consumer. In the case of the private electric company, the consumer is represented in rate-regulation by the Public Service Commission. In the case of the cooperative electric company, the consumer is represented in rate-regulation by himself and through the Rural Electrification Administration. Therefore, although this circumstance is not involved in this case and not now properly before this Court for review, all utilities—both investor owned and cooperative—have been accorded parity of treatment in that the rates of both are subject to supervision and regulation by appropriate representatives of the consumers involved.

Section 6[46] merely made the obtaining of a municipal franchise a requirement before any utility received certification. There is no question but that it operates on all members of the class.

Nor should there be objection to Section 7[47] making the inspection and supervision fee equally applicable to both the private and cooperative electric company. In fact, this provision leads to a conclusion that, except as to rate regulation in the hypothetical situation posed above, both the private and cooperative company are equally subject to the Commission's supervision, for this fee would be subject to attack as a revenue measure if there were a disparity of treatment within the class and yet Otero was required to pay the full fee. Section 7 applies equally to all utilities; if anyone suffered a disadvantage, it was Otero.

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[46] Appendices B, pp.48-49 and C, p. 73.

[47] Appendices B, pp. 49-50 and C, p. 71.

Section 8 enacted a new § 68-7-1.1,[48] of which Paragraph A placed a burden upon the cooperative to apply for and receive certification for its present plant, lines and system, and is equivalent to the first portion of § 68-7-1, theretofore applicable only to private companies. The private company, not Otero, received an advantage, since it was denied area certification accorded to some private electric companies and certification was limited to existing plants, lines and system. *Lea County Electric Coop. v. New Mexico Public Service Commission*, 75 N.M. 191, 402 P. 2d 377 (1965). Paragraph B protected the private company in event of cooperative certification in a duplicative situation and "grandfathered" in the private system. All utilities in a conflict area were, therefore, permitted to continue service, neither advantage nor disadvantage accruing to one over the other.

Section 9[49] accorded Otero no preferential treatment. "In addition to information otherwise required by law," it authorized the Commission to require the cooperative to file rate schedules, service tariffs and other information. It, then, required no less of the cooperative than required of the private electric system and is more than equivalent to § 68-6-3 (Appendix C, p. 68), theretofore applying only to the private company. No disparity of treatment exists.

Assuming that Otero and Community are in the same class, they are treated alike by Laws 1961, Chapter 89, Community having the same protection enjoyed by Otero. The different treatment described by the Court in its Opinion is, when the 1961 amendments are considered together with kindred laws and as to practical effect, as they must be, non-existent.

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[48] Appendices B, pp. 50-51 and C, p. 72.

[49] Appendices B, p. 51 and C, p. 68.

IV.

Prior Precedent of This Court Was Misapplied

The decision and judgment of the Supreme Court of New Mexico was based on this Court's decision in *Frost v. Corporation Commission,* supra. Petitioners respectfully submit that the *Frost* case was misapplied by the Supreme Court of New Mexico.

The *Frost* case involved a suit by appellant Frost to enjoin the Oklahoma State Corporation Commission from issuing a license for a cotton gin to Durant Company. Frost was an individual cotton ginner operating under a permit from the State Corporation Commission under a 1915 statute declaring cotton gins to be public utilities. Durant Company was organized under a 1919 act, described as follows (278 U.S. at 518):

> "Under a statute passed in 1919 (Comp. Stats. 1921, § 5637, et seq.) 10 or more persons may form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan. A corporation thus formed is authorized to issue capital stock to be sold at not less than its par value. The number of shares which may be held by one person, firm or corporation is limited. Dividends may be declared by the directors at a rate not to exceed 8 per cent per annum. Provision is made for setting aside a surplus or reserve fund, and 5 per cent may be set aside for educational purposes. The remainder of the profits of the corporation must be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members and the amounts of the purchases of members from the corporation; but the corporation may adopt bylaws providing for the apportionment of such profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

A proviso to the 1915 certification statute allowed the licensing of a cooperative cotton gin under certain circumstances without a showing of public necessity.

At the outset, this Court mentioned a 1917 statute allowing the formation of "cooperative agricultural or horticultural associations not having capital stock or being conducted for profit."

The question involved the validity of the proviso to the 1915 certification act as applied to Durant Company, organized under the 1919 act, thereby relieving Durant of the burden of showing public necessity which Frost had been required to meet. Upon noting the question, this Court observed (278 U.S. at 522):

> "That a greater burden thereby is laid upon the latter than the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. [Citations omitted.]"

This Court thereupon proceeded to hold the proviso as applied to Durant Company violative of the Fourteenth Amendment, in a paragraph only partially quoted by the Supreme Court of New Mexico. With emphasis added to the portion of the paragraph ignored or overlooked by the Supreme Court of New Mexico, the paragraph relied upon reads as follows (278 U.S. at 523-24):

> *"It is important to bear in mind that the Durant Company was not organized under the act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a nonmember, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof including a pro rata part of the overhead expenses. Comp. Stats. 1921, § 5008.*

Under this exception, the difference between a nonmember and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 act, we have no reason to doubt that the classification created by the proviso might properly be upheld. American Sugar Refining Co. v. Louisiana, 179 *U.S.* 89, 21 *S. Ct.* 43, 45 *L. Ed.* 102; *Warehouse Co. v. Tobacco Growers,* 276 *U.S.* 71, 48 *S. Ct.* 291, 72 *L. Ed* 473. A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to nonmembers, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general pub-

> lic and to the end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences, having reasonable relation to the subject dealt with by the legislation. Power Co. v. Saunders, 274 U.S. 490, 493, 47 S. Ct. 678, 71 L. Ed. 1165; Louisville Gas Co. v. Coleman, supra, 277 U.S. 39, 48 S. Ct. 423, 72 L. Ed. 770; Quaker City Cab Co. v. Pennsylvania, supra, 277 U.S. 402, 48 S. Ct. 553, 72 L. Ed. 927."

Otero and other cooperatives organized under the Rural Electric Cooperative Act (Appendix D) are without capital stock, not conducted for profit and restricted to service in limited areas to their own members except governmental subdivisions and others not in excess of 10% of their memberships, and, therefore, are more analogous to the classification this Court upheld than to the specie of profit-making stock company, psuedo-cooperative classification struckdown. As contrasted with Durant Company vis-a-vis Frost, there are real and substantial differences between Otero and Community having a reasonable relation to the subject dealt with by the legislative regulation primarily to protect against wasteful duplication of utility plant and system. Petitioners therefore submit that not only was this case misapplied to strike down the subclass in the Public Utility Act, as amended, for the rural electric cooperative, but that the *Frost* case is entirely consistent with the validity of the challenged legislation.[50]

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[50] Mr. Justices Brandeis, Holmes and Stone dissented in the *Frost* case, disagreeing that an unreasonable classification existed as to corporations under the 1919 act and agreeing with the majority that no unreasonable classification existed concerning cooperatives which were non-stock, non-profit and had restrictions on the nature of their business.

The majority opinion in the *Frost* case has not been followed by this Court for the proposition that cooperatives cannot be separately classed. Separate classification of cooperative associations was, however, upheld in *Keystone Automobile C. Cas. Co. v. Commissioner of Int. Rev.*, citing Justice Brandeis' dissent in the *Frost* case, 122 F. 2d 886 (3rd Cir. 1941), cert. den., 315 U.S. 814 (1942).

The Supreme Court of New Mexico also compared the opinion in

V.

The Result of One Class for All Electric Utilities

The Supreme Court of New Mexico in the *Socorro* case held that in order to prevent wasteful duplication between the systems of the private and cooperative electric company, each must be a "public utility" within the definition of the Public Utility Act. In the instant case the Supreme Court of New Mexico has held that if the private and cooperative electric companies are so defined in order to prevent wasteful duplication, each must be regulated with mathematical precision in exactly the same manner.

As aforestated, this latter holding overlooks basic differences between the investor and cooperative enterprise. But, assuming, *arguendo,* that one class with identical regulation must be created in order to prevent duplication, what is the result?

Presumably, then, the New Mexico Legislature could choose to regulate this one class in either the manner presently accorded to the investor company or in the manner accorded to the cooperative. If this be true, a new regulatory act could presumably allow the consumer the same voice in the rates of the private company as he has in the rates of the cooperative —that is, each consumer having one vote, each trustee-director being required to be a consumer and each utility being required to pay automatic dividends at the end of the fiscal year, or, since consumer controlled, no dividends to the stockholders. If certiorari is not allowed and the judgment of the Supreme Court of New Mexico is permitted to stand, the New Mexico Legislature would be free to create one class of utilities and if it chose to regulate this one class by the cooperative method, rather than the investor-type method, your petitioners strongly suspect that Community and other private companies

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Chickosha Cotton Oil Company v. Cotton County Gin Company, 40 F. 2d 846 (10th Cir. 1930). This authority gives no independent support to the proposition relied upon by the Supreme Court of New Mexico and merely followed *Frost* under the Oklahoma cotton ginning statute and held a separate classification for a non-cooperative business was unreasonable.

—and rightly so—would be the first to object that basic differences exist between the cooperative and private enterprise and that the cooperative method of consumer regulation is entirely inappropriate to regulate the investor utility.

To state this possible consequence of the judgment below, then, is to state the error of the Supreme Court of New Mexico in holding that if the public is to be protected against wasteful duplication, all segments of the electric service industry must be placed in one class subject to identical regulation.

Another illustration is the matter of rate regulation. Rate regulation is both to protect the consumer against exploitation at the hands of the utility and to ensure a fair return to the equity owners commensurate with their investment.[51] Neither purpose is applicable to the cooperative since the interest of the consumer and utility are substantially the same. If the private and cooperative electric company were required to be classified the same, rate regulation presumably would have to be uniform, in which event the Commission would have to determine a rate of return fair to the stockholders of the private corporation and members-consumers of the cooperative. The rate-making process as applied to the cooperative would be totally ineffectual and illusory in this regard, since the return attributable to the investment would be automatically distributed in patronage refunds. The fallacy of requiring the same, identical regulation for these two very different enterprises is, therefore, particularly apparent in the rate-making process, the principal feature of Laws 1961, Chapter 89 which the Supreme Court of New Mexico held was not subject to different treatment for the private electric company and the rural electric cooperative. There is no need for the Commission's general regulation of the cooperative's rates and, if in accordance with the judgment of the Supreme Court of New Mexico it were attempted in the same fashion as rate regulation of the investor corporation, the process would be a costly procedure without substance.

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[51] *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). For an example of judicial intervention to protect the equity owner against confiscatory rates, see *Moyston v. New Mexico Public Service Commission*, 76 N.M. 146, 412 P. 2d 840 (1966).

Other examples of the undesirable consequences of the legal straight jacket enunciated by the Supreme Court of New Mexico for utility regulation in New Mexico and elsewhere do exist. The above, however, are illustrative of the practical reasons why certiorari should be granted at bar.

CONCLUSION

Whether Laws 1961, Chapter 89 violates the Fourteenth Amendment to the Constitution of the United States presents a special and important issue to this Court, affecting the very lifeblood of federally aided and cooperatively supplied electricity to thousands of citizens residing in the rural areas of the State of New Mexico. The Supreme Court of New Mexico has not only decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, but has misapplied a decision of this Court in reaching its determination.[52]

For the reasons above stated, your petitioners respectfully submit that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

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[52] See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939); *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531 (1941); *State Bd. of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1961).

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APPENDIX A

Opinion of Supreme Court of New Mexico

MOISE, Justice.

We are here called upon to pass on the constitutionality of Ch. 89, N.M.S.L. 1961, insofar as it attempted to place rural electric cooperatives under the Public Utility Act for certain purposes by including them within the definition of "public utility." The act amended § 68-3-2(F) (1) by adding the italicized words:

> "'Public utility' or 'utility' means every person not engaged solely in interstate business and except as hereinafter stated, that now does or hereafter may own, operate, lease or control:
>
> (1) Any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity for light, heat, or power or other uses, *including corporations organized under sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation; known as the Rural Electric Co-operative Act;* * * *."

At the same time, nothing was done to change § 45-4-3(d), N.M.S.A. 1953, which reads:

> "A cooperative shall have power:
>
> * * *
>
> (d) To generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten per centum (10%) of the number of its members; * * *."

Petitioner, hereinafter referred to as "Community," is a public utility within the definition of that term in § 68-3-2(F), N.M.S.A. 1953, prior to its amendment in 1961. Respondent, Otero County Electric Cooperative, Inc., hereinafter referred to as "Otero," is a corporation organized under the Rural Electric Cooperative Act (§§ 45-4-1 to 45-4-32, N.M.S.A. 1953) and holds a certificate of convenience and necessity issued pursuant to § 68-7-1.1, N.M.S.A. 1953. Respondent, The New Mexico Public Service Commission, hereinafter referred to as "Commission," was established by § 68-4-1, N.M.S.A. 1953.

Community here appeals from a district court judgment affirming an order of the Commission in a proceeding under §§ 68-9-1 to 68-9-5, N.M.S.A. 1953, wherein the Commission granted a certificate of public convenience and necessity to Otero to serve the Sun Valley Subdivision near Alto, New Mexico. Community timely raised the constitutional issues, and here appeals from the decision of the trial court upholding the statute. It argues that the 1961 amendment is void because it constitutes an arbitrary and unreasonable classification. It asserts that this is so because cooperatives are included under the Act though not required to render service to the general public and no provision is made for complete regulation of rates charged by them (§ 68-5-4.1, N.M.S.A. 1953) or securities issued by them (§ 68-5-8, N.M.S.A. 1953), whereas Community must render service to the public generally and its rates and financing are completely supervised and controlled. On the other hand, Otero is here asserting that it is a public utility and accordingly entitled to the protection of the act; and, further, that the special privileges accorded in §§ 68-5-4.1 and 68-5-8, supra, are based upon a reasonable classification.

In Socorro Electric Coop., Inc. v. Public Service Co., 66 N.M., 343, 348 P. 2d 88, we held that an electric cooperative was not open for the use and service of all the members of the public who might require it, and that therefore, a cooperative could not be a public utility. See Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P. 2d 646. In the light of this decision, it seems fairly evident that by Ch. 89, N.M.S.L. 1961, and particularly by the amendment to § 68-3-2(F) (1), supra, it was the purpose of the legislature to overrule this court and make rural electric cooperatives into public utilities. That the legislature could accomplish this purpose, Community does not question. However, it does assert that it could not be done in the manner attempted, and that the act is unconstitutional for the reasons set out above.

One recent decision of this court should be noticed. In Edington v. New Mexico Public Service Commission, 74 N.M. 647, 397 P. 2d 300, we reviewed the history of the Public Utility Act down to and including the 1961 amendment. Concerning the claim of denial of equal protection of the law raised by Edington, we determined that no complaint would be heard since before the 1961 amendment the Commission had no jurisdiction of the cooperative or of its rates where there was an overlap between its service and that of Edington whereas, subsequent thereto, the Commission did have power to fix rates of both when there was an overlapping or conflicting certificate of convenience and necessity and, consequently, Edington could not possibly have been adversely affected by the amendment.

In the instant case, a direct conflict between the rights and privileges of Community and Otero under § 68-7-1, supra, presents itself. This would not occur if Otero were not a public utility. Further, the Commission specifically found that, "Otero's rates are fixed by its Board of Trustees and are not subject to regulation by the Public Service Commission." These characteristics distinguish this case from Edington, and out of these differences the right to question the constitutionality of the amendment results.

While we recognize that absolutely equal treatment of parties performing similar service is not demanded in order for a legislative act to withstand an attack on its constitutionality, Dominion Hotel v. State of Arizona, 249 U.S. 265, 39 S. Ct. 273, 63 L. Ed. 597; Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P. 2d 105, it is nevertheless imperative that where classification is attempted, the same must be reasonable and based on real differences bearing a proper relationship to the classification, and there must be uniformity of treatment within each class. State v. Pate, 47 N.M. 182, 138 P. 2d 1006; Burch v. Foy, 62 N.M. 219, 308, P. 2d 199.

The amendment to the definitions in § 68-3-2, supra, would make Otero a public utility, along with Community. Because of this change in the law, there arose a duty not previously present under § 68-7-1, supra, for Community to obtain a permit before undertaking the construction here in question. However, this is not all. Whereas Community thereby had new restrictions placed upon it, Otero was still not made subject to the same regulation and control which Community was under, as provided in § 68-5-4.1, supra, nor does it have the duty to serve the public generally. As a matter of fact, by the terms of its charter, issued under § 45-4-3 (d), supra, its power to serve persons other than its members, governmental agencies and political subdivisions is limited to a number not in excess of 10% of the number of its members. Section 68-5-4.1, supra, denies the Commission jurisdiction over rates of co-operatives such as Otero "except in any territory in which an overlapping or conflirting certificate of convenience and necessity has been issued to and exercised by any other public utility for the same class of service * * *. At the same time, the Commission has "general and exclusive power and jurisdiction to regulate and supervise * * * rates and service regulations * * *" of Community. § 68-5-4, N.M.S.A. 1953.

Can we say that the different treatment accorded a utility such as Community under the law from that accorded Otero is reasonable and based upon real differences in the two companies? In answering the question, we repeat that both are "public utilities" under the definition of § 68-3-2 (F), supra. When we consider the additional facts that under its charter Otero does not and cannot serve the public generally and does not have its rates controlled except in overlapping situations, we cannot escape the conclusion that by comparison with Community it is at a decided advantage. This is what is prohibited by the Fourteenth Amendment to the Constitution of the United States, and by Art. II, § 18, of the Constitution of New Mexico.

Under the facts of this case, insofar as Community seeks to serve the public and Otero seeks to serve customers who are not members, they are both attempting to secure business out of which they can make a profit. We are convinced that there is no real basis for applying one set of rules to one and a different set to the other. This is not permitted under the Constitution of the United States. Frost v. Corporation Commission, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483. The equal protection clause protects against "invidious discrimination." To our minds, the invidious discrimination present in the legislation under consideration is too apparent to require elaboration. See Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485.

In the statute considered here, we can perceive of no supportable or rational basis for permitting an electric cooperative such as Otero to serve selected individuals who are not members of the cooperative (it does not have to serve the public generally and may not serve in excess of 10% of the number of its members) with entire freedom from control of its rates (except in overlapping situations not here present) while at the same time Community, when serving the same individuals, is required to charge for such service only such rates as the Commission approves.

The following, quoted from Frost v. Corporation Commission, supra, is pertinent:

> " * * * A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding 8 per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to nonmembers, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for

> the classification attempted, it lacks both relevance and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. Power [Mfg.] Co. v. Saunders, 274 U.S. 490, 493, 47 S. Ct. 678, 71 L. Ed. 1165, 1167; Louisville Gas & Electric Co. v. Coleman, supra, 277 U.S. [32], 39, 48 S. Ct. 423, 72 L. Ed. 770, 774; Quaker City Cab Co. v. [Com. of] Penna., supra, 277 U.S. 389, 402, 48 S. Ct. 553, 72 L. Ed. [927] 930." (278 U.S. 515, 524, 49 S. Ct. 235, 238).

See also, Chickasha Cotton Oil Company v. Cotton County Gin Company (C.A. 10, 1930) 40 F. 2d 846, 74 A.L.R. 1070.

The language of this court in State v. Thompson, 57 N.M. 459, 463, 260 P. 2d 370, fully recognizes this rule under both the Constitutions of the United States and of New Mexico.

> "The equal protection of the Fourteenth Amendment of the Constitution of the United States and Article 2, Section 18 of the State Constitution have for all practical purposes the same effect. They constitute a guaranty that all persons subject to state legislation shall be treated alike under similar circumstances and conditions in privileges conferred and liabilities imposed. * * * "

See also, State v. Sunset Ditch Co., 48 N.M. 17, 145 P. 2d 219.

We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18, of the New Mexico Constitution. This result has not been reached without full consideration of the oft-repeated rule that legislative acts are presumptively valid and that this court should not hold otherwise on constitutional grounds without being clearly satisfied that no other conclusion can reasonably be reached. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P. 2d 205; State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P. 2d 511.

Having concluded that the questioned legislation must be held invalid as violative of the Constitutions in the manner hereinabove discussed, it is not necessary for us to consider the additional grounds of unconstitutionality argued by Community in its brief.

The district court having arrived at an erroneous conclusion, its judgment is reversed and the cause remanded with instructions to proceed in a manner consistent herewith.

It is so ordered.

CARMODY, C. J., and CHAVEZ, NOBLE, and COMPTON, JJ., concur.

APPENDIX B

New Mexico Laws 1961, Chapter 89

AN ACT RELATING TO PUBLIC UTILITIES; AMENDING SECTIONS 68-3-1, 68-3-2, 68-3-3, 68-5-8, 68-6-8, AND 68-7-4 NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION (BEING LAWS 1941, CHAPTER 84, PREAMBLE, SECTION 1, 2, 20, 44, AND 49, AS AMENDED); ENACTING NEW SECTIONS 68-5-4.1, 68-6-3.1 AND 68-7-1.1 NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION; EXTENDING THE COVERAGE OF THE PUBLIC UTILITY ACT, AS AMENDED, TO RURAL ELECTRICAL COOPERATIVES IN CERTAIN RESPECTS.

HOUSE BILL NO. 256; Approved March 22, 1961

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. Section 68-3-1 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1941, Chapter 84, Preamble) is amended to read:

"68-3-1. DECLARATION OF POLICY—

A. Public utilities, as defined in Section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation, are affected with the public interest in that, among other things,

(1) a substantial portion of their business and activities involves the rendition of essential public services to large numbers of the general public,

(2) their financing involves the investment of large sums of money, including capital obtained from many members of the general public, and

(3) the development and extension of their business directly affects the development, growth, and expansion of the general welfare, business and industry of the state.

B. It is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry."

Section 2. Section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1941, Chapter 84, Section 1) is amended to read:

"68-3-2. DEFINITIONS—WORDS AND PHRASES.— Unless otherwise specified, when used in the Public Utility Act, as amended:

A. "commission" means the New Mexico public service commission.

B. "commissioners" means any member of the commission.

C. "municipality" means any municipal corporation organized under the laws of the state.

D. "person" means individuals, firms, partnerships, companies, corporations, and lessees, trustees or receivers appointed by any court whatsoever. It shall not mean any municipality as herein defined unless such municipality shall have elected to come within the terms of the Public Utility Act, as amended, as provided in Section 68-5-5 New Mexico Statutes Annotated, 1953 Compilation. In the absence of such voluntary election by any municipality to come within the provisions of the Public Utility Act, as amended, such municipality shall be expressly excluded from the operation of said act and from the operation of all its provisions, and no such municipality shall for any purpose be considered a public utility.

E. "securities" means stock, stock certificates, bonds, notes, debentures, mortgages or deeds of trust, or other evidences of indebtedness issued, executed, or assumed by any utility.

F. "public utility" or "utility" means every person not engaged solely in interstate business and except as hereinafter stated, that now does or hereafter may own, operate, lease or control:

(1) any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity for light, heat, or power or other uses, including corporations organized under Sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation; known as the Rural Electric Cooperative Act; or

(2) any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas, or mixed or liquefied petroleum gas, for light, heat, or power, or other uses; but the term "public utility" or "utility" shall not include any plant, property or facility used for or in connection with the business of the manufacture, storage, distribution, sale or furnishing of liquefied petroleum gas in enclosed containers or tank truck for use by others than consumers who receive their supply through any pipeline system operating under municipal authority or franchise, and distributing to the public; or

(3) any plant, property, or facility for the supplying, storage, distribution, or furnishing to or for the public of water, for manufacturing, municipal, domestic, or other uses; provided, however, nothing herein contained shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation; or

(4) any plant, property, or facility for the production, transmission, conveyance, delivery, or furnishing to or for the public of steam for heat or power or other uses.

G. "rate" means every rate, tariff, fare, toll, charge, or other compensation for service rendered, or to be rendered by any utility, and every rule, regulation, practice, act, requirement, or privilege in any way relating to such rate, fare, toll, charge, or other compensation, and any schedule or tariff, or part of a schedule or tariff thereof.

H. "service" or "service regulation" means every rule, regulation, practice, act, or requirement in any way relating to the service or facility of a utility."

Section 3. Section 68-3-3 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1941, Chapter 84, Section 2) is amended to read:

"68-3-3. LIMITATIONS AND EXCEPTIONS.—The term "public utility" or "utility" when used in the Public Utility Act, as amended, shall not include any person not otherwise a public utility, who furnishes the service or commodity only to himself, his employees or tenants, when such service or commodity is not resold to or used by others; and shall not include a corporation engaged in the business of operating a railroad and which does not primarily engage in the business of selling the service or commodity but which only incidentally to its railroad business, or occasionally, furnishes the service or commodity to another under a separate limited or revocable agreement or sells to a utility or municipality for resale, or which sells service of a commodity to another railroad or to the state or federal government or governmental agency, or which sells or gives for a consideration under revocable agreements or permits quantities of water out of any surplus of water supply acquired and held by it primarily for railroad purposes; and such railroad corporation shall not be subject to any of the provisions of this act. The business of any public utility other than of the character defined in subdivision F of Section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation is not subject to provisions of the Public Utility Act, as amended; but nothing contained in said act shall be construed as giving to the public service commission, hereinafter created, any powers or jurisdiction over public utilities covered by Section 7 of Article XI, Constitution of New Mexico."

Section 4. Section 68-5-8, New Mexico Statutes Annotated, 1953 Compilation, (being Laws 1941, Chapter 84, Section 20) is amended to read:

"68-5-8. EXEMPTED SECURITIES.—A public utility may issue securities, other than stock or stock certificates, payable at periods of not more than eighteen months after the date of issuance of same, and secured or unsecured, without application to or order of the commission, but no such securities so issued shall in whole or in part be refunded by any issue of stock, stock certificates or other securities having a maturity of more than eighteen months, except on application to and approval of the commission. A public utility may issue and deliver notes, bonds, or other evidence of indebtedness and security therefor to the United States of America or any agency or instrumentality thereof without application to or order from the commission."

Section 5. A new Section 68-5-4.1 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"68-5-4.1. NO JURISDICTION IN PUBLIC SERVICE COMMISSION OVER RATES OF RURAL ELECTRIC CO-OPERATIVES—EXCEPTIONS.—The public service commission shall have no jurisdiction over rates charged by utilities organized under Sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, known as the Rural Electric Cooperative Act, except in any territory in which an overlapping or conflicting certificate of convenience and necessity has been issued to and exercised by any other public utility for the same class of service; provided that, except as provided in Section 8 A of this 1961 act, nothing in this section shall be construed to prohibit the public service commission from inquiring into the reasonableness of the rates of any public utility in connection with any application for the granting or extension of any certificate of convenience and necessity or in connection with any complaint of a public utility of present or threatened unreasonable interference with its service or system."

Section 6. Section 68-7-4 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1941, Chapter 84, Section 49) is amended to read:

"68-7-4. CERTIFICATES — APPLICATION — ISSUANCE.—Before any certificate may issue under Sections 68-7-1 through 68-7-4 New Mexico Statutes Annotated, 1953 Compilation, a certified copy of its articles of incorporation or charter, if the applicant be a corporation, shall be on file in the office of the commission. Every applicant for a certificate shall give such reasonable notice of its application as the commission may require and shall file in the office of the commission may rebuire and shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the consent and franchise from the municipality wherein construction and operation is proposed. The commission shall have power, after hearing, to issue said certificate, as prayed for, or to refuse to issue the same, or to issue it for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of said rights or privilege, and may attach to the exercise of the rights granted by said certificate such terms and conditions in harmony with the Public Utility Act, as amended, as in its judgment the public convenience and necessity may require. If such public utility desires to exercise a right or privilege under a franchise which has not as yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under such rules and regulations as it may prescribe, issue the desired certificate, upon such terms and conditions as it may designate, after such public utility has obtained the contemplated franchise. Upon the presentation to the commission of evidence satisfactory to it that such franchise has been secured by such public utility, the commission shall thereupon issue such certificate. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity as required by the provisions of the Public Utility Act, as amended, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction or operation until the commission makes and files its decision on said complaint or until the further order of the commission. The commission may after hearing, after reasonable notice, make such order and prescribe such terms and conditions in harmony with the Public Utility Act, as amended, as are just and reasonable."

Section 7. Section 68-6-8 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1941, Chapter 84, Section 44, as amended) is amended to read:

"68-6-8. INSPECTION AND SUPERVISION FEES.—Each utility doing business in this state and subject to the control and jurisdiction of the commission with respect to its rates or service regulations, including corporations organized under Sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, shall pay annually to the state a fee for the inspection and supervision of such business, an amount equal to one-half of one percent of its gross receipts from business transacted in New Mexico for the preceding calendar year. Said sum shall be payable in equal quarterly installments on or before January 20, April 20, July 20, and October 20, in each year. Such inspection and supervision fees shall be paid by such utilities in addition to any and all property, franchise, license, intangible, and other taxes, fees and charges now or hereafter provided by law. No similar inspection and supervision fee shall be measured by the amount of the gross receipts of each such utility for the calendar year next preceding the date herein fixed for the payment of the same, except that in case of such utilities engaged in interstate business, the fees shall be measured by the gross receipts of such utilities from intrastate business only, for such preceding calendar year, and not in any respect upon receipts derived wholly or in part from interstate business."

Section 8. A new Section 68-7-1.1 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"68-7-1.1. APPLICATIONS BY UTILITIES BROUGHT UNDER PUBLIC UTILITY ACT.—

A. Within ten days after the effective date of this 1961 act, each utility brought within the jurisdiction of the public service commission for the first time by virtue of this 1961 act, shall file with the commission an application for a certificate of convenience and necessity covering its present plant, lines and system. Upon proof of present existence and operation thereof, the commission shall grant the certificate to such utility.

B. In the event the certificate granted a utility under subsection A of this section, overlaps or conflicts with a certificate heretofore issued by the commission and exercised within the time required under Section 68-7-2 New Mexico Statutes Annotated, 1953 Compilation, both certificates shall be valid and both utilities shall be permitted to continue service."

Section 9. A new Section 68-6-3.1 New Mexico Statutes Annotated, 1953 Compilation is enacted to read:

"68-6-3.1. COMMISSION MAY REQUIRE COOPERATIVES TO FILE INFORMATION.—In addition to information otherwise required by law, the public service commission may adopt regulations relating to the filing with it by rural electric cooperatives of rate schedules, conditions of service, and any changes in such schedules or conditions as may be made together with such other information as the commission may deem advisable for the effective administration of the Public Utilities Act, as amended."

Section 10. EFFECTIVE DATE.—The effective date of this act shall be July 1, 1961.

APPENDIX C

New Mexico Public Utility Act, as amended*

68-3-1. DECLARATION OF POLICY.—A. Public utilities, as defined in section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation, are affected with the public interest in that, among other things,

(1) a substantial portion of their business and activities involves the rendition of essential public services to large numbers of the general public,

(2) their financing involves the investment of large sums of money, including capital obtained from many members of the general public, and

(3) the development and extension of their business directly affects the development, growth, and expansion of the general welfare, business and industry of the state.

B. It is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, *without unnecessary duplication and economic waste,* of proper plants and facilities for the rendition of service to the general public and to industry.

68-3-2. DEFINITIONS—WORDS AND PHRASES—Unless otherwise specified, when used in the Public Utility Act, as amended,

A. "Commission" means the New Mexico public service commission.

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*As presently amended. The language added by Laws 1961, Chapter 89 is italicized and the language deleted thereby is enclosed within brackets, except minor changes in phraseology and punctuation are omitted.

B. "Commissioners" means any member of the commission.

C. "Municipality" means any municipal corporation organized under the laws of the state.

D. "Person" means individuals, firms, partnerships, companies, corporations, and lessees, trustees or receivers appointed by any court whatsoever. It shall not mean any municipality as herein defined unless such municipality shall have elected to come within the terms of the Public Utility Act, as amended, as provided in section 68-5-5 New Mexico Statutes Annotated, 1953 Compilation. In the absence of such voluntary election by any municipality to come within the provisions of the Public Utility Act, as amended, such municipality shall be expressly excluded from the operation of said act, and from the operation of all its provisions, and no such municipality shall for any purpose be considered a public utility.

E. "Securities" means stock, stock certificates, bonds, notes, debentures, mortgages or, deeds of trust, or other evidences of indebtedness issued, executed, or assumed by any utility.

F. "Public utility" or "utility" means every person not engaged solely in interstate business and except as hereinafter stated, that now does, or hereafter may own, operate, lease or control:

(1) Any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity for light, heat, or power or other uses, *including corporations organized under sections* 45-4-1 *through* 45-4-32 *New Mexico Statutes Annotated,* 1953 *Compilation; known as the Rural Electric Co-operative Act; or*

(2) Any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas, or mixed or liquefied petroleum gas, for light, heat, or power, or other uses: but the term "public utility" or "utility" shall not include any plant, property or facility used for or in connection with the business of the manufacture, storage, distribution, sale or furnish-

ing of liquefied petroleum gas in enclosed containers or tank truck for use by others than consumers who receive their supply through any pipeline system operating under municipal authority or franchise, and distributing to the public; or

(3) Any plant, property, or facility for the supplying, storage, distribution, or furnishing to or for the public of water for manufacturing, municipal, domestic, or other uses; Provided, however, nothing herein contained shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation; or

(4) Any plant, property, or facility for the production, transmission, conveyance, delivery, or furnishing to or for the public of steam for heat or power or other uses.

G. "Rate" means every rate, tariff, charge or other compensation for utility service rendered, or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff, or part of a schedule or tariff thereof.

H. "Service" or "service regulation" means every rule, regulation, practice, act, or requirement in any way relating to the service or facility of a utility.

68-3-3. LIMITATIONS AND EXCEPTIONS.—The term "public utility" or "utility" when used in the Public Utility Act, as amended, shall not include any person not otherwise a public utility, who furnishes the service or commodity only to himself, his employees or tenants, when such service or commodity is not resold to or used by others; and shall not include a corporation engaged in the business of operating a railroad and which does not primarily engage in the business of selling the service or commodity but which only incidentally to its railroad business, or occasionally, furnishes the service or commodity to another under a separate limited or revocable agreement or sells to a utility or municipality for resale, or which sells service of a commodity to another railroad or to the state or federal government or governmental agency, or which sells or gives for a consideration under revocable agreements or permits quantities of water out of any surplus of water supply acquired and held by it primarily for railroad purposes; and such railroad corporation shall not be subject to any of the provisions of this act. The business of any public utility other than of the character defined in subdivision F of section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation is not subject to provisions of the Public Utility Act, as amended; but nothing contained in said act shall be construed as giving to the public service commission, hereinafter created, any powers or jurisdiction over public utilities covered by section 7 of Article XI, Constitution of New Mexico. [or over corporation organifed under Chapter 47 of Laws of 1939, known as the Rural Electric Co-operative Act.]

68-4-1. PUBLIC SERVICE COMMISSION ESTABLISHED.—A commission to be known as New Mexico Public Service Commission, consisting of three commissioners who shall be competent persons and qualified electors of this state, is hereby established.

68-4-2. PUBLIC SERVICE COMMISSIONERS — APPOINTMENT—TERMS OF OFFICE—SALARY.—The members of the commission shall be appointed by the governor with the advice and consent of the senate. If the senate shall not be in session when this act becomes effective, or when any vacancy occurs, the original appointments, or any appointments, made by the governor to fill a vacancy, shall be subject to the approval of the senate when convened. Within twenty days after the effective date of this act, the governor shall appoint a public service commissioner whose term shall expire on the 15th day of January, 1947; another whose term shall expire on the 15th day of January, 1945; and another whose term shall expire on the 15th day of January, 1943; and thereafter at the expiration of each term, a successor shall be appointed and confirmed for a period of six years. Vacancies or unexpired terms shall be filled in the same manner as original appointments, but the appointee shall hold only to the end of said unexpired term. The commissioner whose term shall expire on the 15th day of January, 1947, shall be chairman of the commission, and thereafter, the commissioner who has been longest in continuous service upon the commission shall act as chairman. The annual salary to be paid to each commissioner shall be twelve thousand five hundred dollars, in the manner now provided by law for other state officers out of the funds hereinafter provided for the maintenance of the commission. No commissioner shall seek nomination or election to any civil office in the state of New Mexico while he is a member of said commission; and if any member shall, during his term of office, become a candidate for nomination for, or election to, any civil office in the state of New Mexico, his office as commissioner shall forthwith become vacant, and the governor shall appoint his successor in the manner herein provided.

68-4-3. NAME OF COMMISSION, OATH OF OFFICE, SEAL OF OFFICE.—The commission shall be known as "New Mexico Public Service Commission"; and said commission shall have a seal with the words "New Mexico Public Service Commission" with such emblem as the commission may prescribe; and the members of said commission shall be state officers, and before entering upon the discharge of their duties they shall take the oath of office prescribed for other state officers.

68-4-4. INELIGIBILITY TO OFFICE OF COMMISSIONER.—No person owning any securities, or interested in the business, of any public utility, as hereinabove defined, either directly or indirectly, shall be eligible to the office of public service commissioner.

68-4-5. REMOVAL OF COMMISSIONERS.—The governor may remove any commissioner for incompetency, neglect of duty, or malfeasance in office; and it shall be an additional cause for removal of any commissioner if he shall accept any gift, gratuity, emolument, or employment from any firm, person, corporation, company, or association, owning or operating any public utility, as hereinabove defined, in whole or in part in this state, during his continuance in office; before any commissioner is removed, he shall be given a copy of the charges against him and an opportunity of being publicly heard before the governor in person or by counsel in his own defense, upon not less than ten days' notice.

68-4-6. RESIDENCE OF MEMBERS OF COMMISSION—WHOLE TIME GIVEN TO WORK.—Each member of the commission shall devote his whole time to his official business, and shall reside at the state capitol during the time he continues in office.

68-4-7. CLERK AND STENOGRAPHER EMPLOYED BY COMMISSION—SALARY.—The commission may employ one clerk or secretary at a salary not to exceed forty-eight hundred dollars per annum; and one stenographer at a salary not to exceed thirty-six hundred dollars per annum; and said salaries shall be paid as the salaries of other state officers; such clerk or secretary and such stenographer shall not hold office for any fixed term, but may be removed at the pleasure of the commission.

68-4-8. OFFICERS, AGENTS AND ASSISTANTS.—The commission may appoint and employ such officers, agents, assistants and other employees as may be necessary to carry out the provisions of the Public Utility Act, or to perform the duties and exercise the powers conferred by law upon the commission. In addition to the services of the attorney general as provided hereinafter, the New Mexico public service commission shall have authority to employ competent attorneys to handle the legal matters of the commission and give advice and counsel in regard to any matter connected with the duties of the commission and in the discretion of the commission to represent the commission in any legal proceeding, including the enforcement of any and all laws and regulations concerned with the Public Utility Act and the commission shall be empowered and authoriped to fix the compensation to be paid to the attorneys employed under the authority of this section; Provided that said attorneys shall be compensated from the budget of the New Mexico public service commission as appropriated by the legislature.

68-4-9. COUNSEL—DUTIES.—It shall be the duty of the attorney general to advise, to represent, and to appear for the commission in all actions and proceedings involving any question under this act or under any order or act of the commission.

68-4-10. COMPENSATION FOR OFFICERS, AGENTS, ASSISTANTS AND OTHER EMPLOYEES — EXPENSES — DISBURSEMENTS.—All such officers, agents, assistants and other employees as may be employed by the commission, with the approval of the governor, shall receive compensation to be fixed by the commission, subject to the approval of the governor, within the limits provided by regulation adopted by the state personnel director. The commission and its officers, agents, assistants and employees shall have reimbursed to them all actual and necessary traveling and other expenses and disbursements necessarily incurred by them or made by them in the discharge of their official duty. The commissioners may also incur necessary expenses for office furniture, stationery, printing and other incidental expenses. Any money paid out under the provisions of the Public Utility Act shall be paid out of the state treasury on warrants drawn by the finance director on the state treasury.

68-4-11. OFFICE AT CAPITOL—SESSION—MEETINGS —WHEN AND WHERE HELD—RECORD OF MEETINGS.—Such commissioners shall have an office at the capitol and shall meet on the first Monday of every month and shall remain in session until all business before them is disposed of; they shall hold other sessions at such times as may be proper or may be necessary for the proper discharge of their duties, or as the evidence of parties in the judgment of the commission may require; they shall keep a record of their proceedings, which shall be open at all times to the inspection of the public. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

68-5-1. RULES — ADOPTION — PUBLICATION — PURPOSE—OPEN HEARINGS.—The commission may adopt and publish rules to govern its proceedings, and such rules, together with this act shall regulate the mode and manner of all investigations and hearings before it, Provided that all hearings shall be open to the public.

68-5-2. REPORTS TO GOVERNOR.—On or before the first day of October of each year, the public service commission, through the chairman thereof, shall make to the governor for transmission to the legislature, a report on its acts and doings for the year ending on the 30th day of June next preceding, setting forth such facts as will disclose the actual workings of the public utilities as hereinabove defined, of this state, and make such suggestions as to said commission may seem appropriate, and for the best interests of the state, including the protection of consumers and investors, and the encouragement and development of industry within the state.

68-5-3. COMMISSIONERS AND EMPLOYEES SHALL NOT RENDER SERVICE TO PUBLIC UTILITIES.—No public service commissioner or clerk or employee of the commission shall, during his continuance in office, personally or through any partner, or agent, render any professional service, or make or perform any contracts for or with any corporation, firm, company, or association, or persons owning or operating any public utility as in this act defined, in this state, except contracts made by such commissioners and employees as consumers of utility products or of facilities or equipment for the use of such products.

68-5-4. SUPERVISION AND REGULATION OF UTILITIES.—A. The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations, and in respect to its securities, all in accordancce with the provisions, and subject to the reservation of, the Public Utility Act and to do all things necessary and convenient in the exercise of its power and jurisdiction. Nothing in this section, however, shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation either directly or through a municipally owned corporation, or owned and operated by any H class county either directly or through a corporation owned by or under contract with an H class county, and no inspection or supervision fees shall be paid by such municipalities or municipally owned corporations, or H class counties, or such corporation owned by or under contract with an H-class county with respect to operations conducted in H class counties.

B. The sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such gas, water or electricity at the place where the major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate; Provided, however, that nothing herein contained shall be construed to permit regulation by the commission of production or sale price, at the well head, of gas or petroleum.

68-5-4.1. *NO JURISDICTION IN PUBLIC SERVICE COMMISSION OVER RATES OF RURAL ELECTRIC CO-OPERATIVES—EXCEPTIONS.—The public service commission shall have no jurisdiction over rates charged by utilities organized under sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, known as the Rural Electric Co-operative Act, except in any territory in which an overlapping or conflicting certificate of convenience and necessity has been issued to and exercised by any other public utility for the same class of service; Provided that, except as provided in section 8 A of this 1961 act, nothing in this section shall be construed to prohibit the public service commission from inquiring into the reasonableness of the rates of any public utility in connection with any application for the granting or extension of any certificate of convenience and necessity or in connection with any complaint of a public utility of present or threatened unreasonable interference with its service or system.*

68-5-5. LOCAL OPTION.—Notwithstanding any of the provisions in section 17 hereof, any municipality desiring to avail itself of all the benefits of this act and of the regulatory services of the commission created by this act, shall have the right to elect to come within the provisions of this act and to have the utilities owned and operated by it either directly or through a municipally owned corporation, regulated and supervised under the provisions of this act, and when a municipality so elects, in the manner hereinafter provided, it shall be subject to any and all of the provisions of this act. Such election shall be held as follows:

(a) At any time after the effective date of this act, the legal voters of any municipality may petition in writing the board of trustees or municipal council by filing a petition in the office of the municipal clerk to hold an election for the purpose of determining whether the municipality shall be subject to the provisions of this act. If the aggregate of the names signed to such a petition shall equal or exceed twenty-five (25%) per cent of the number of legal votes cast in said municipality for governor at the last preceding general election, then, in that event, the council or other governing body of the municipality shall call an election to be held within sixty days of the filing of such petition: Provided, however, that if a general municipal election is to be held for any other purpose within six months of the filing of such petition, the election herein provided for shall be held at the same time and through the same election machinery used at said election.

(b) Said election shall be held in the same manner as, and with the same registration books as may be available for, other municipal elections. The ballots to be submitted to the voters at such election shall present to the voters the following questions:

> "For regulation of municipally owned utilities by the New Mexico Public Service Commission———
>
> "Against regulation of municipally owned utilities by the New Mexico Public Service Commission——"

The votes at said election shall be counted, returned and canvassed as provided for in the case of general municipal elections. If the majority of all the votes cast at said election shall be in favor of regulation of municipally owned utilities, the governing body of said municipality shall declare by order entered upon the records of said municipality, that it is subject to all the provisions of this act; and if the majority of all votes cast in said election shall be cast against such regulation of public utilities, the result of said election shall be declared and entered in the same manner as above set forth.

(c) No election for the same purpose shall be held within two years of each other.

68-5-6. ISSUANCE, ASSUMPTION OR GUARANTEE OF SECURITIES.—The power of a public utility to issue, assume or guarantee securities, and to create liens on its property situated within this state is a special privilege, hereby subjected to the supervision and control of the commission as hereinafter in this act set forth. A public utility, when authorized by order of the commission and not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen months after the date thereof, for the following purposes and no other: For the acquisition of property; for the construction, completion, extension or improvement of its facilities; for the improvement of maintenance of its service; for the discharge of lawful refunding of its obligations; for the reimbursement of moneys actually expended for said purposes from income or from any other moneys in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five years next prior to the filing of an application with the commission for the required authorization; or for any of the aforesaid purposes; Provided however, that the commission may authorize issuance by a public utility of shares of stock of any class as a dividend on outstanding shares of stock of such public utility of any class and may authorize the issuance of the same or of a different number of shares of stock of any class in exchange for outstanding shares of stock of any class of such public utility and such public utility may issue the stock so authorized.

68-5-7. APPLICATION FOR ISSUANCE OF SECURITIES—ORDER OF COMMISSION.—Such public utility shall, by written petition filed with the commission and setting forth the pertinent facts involved, make application to the commission for an order authorizing the proposed issue, assumption or guarantee of securities, and the application of the proceeds therefrom to the purposes specified. The commission shall, after such hearing and upon such notice as the commission may prescribe, enter its written order approving the petition and authorizing the proposed securities transactions, unless the commission shall find: That such transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act; or that the aggregate amount of the securities outstanding and proposed to be outstanding will exceed the fair value of the properties and business of the public utility.

68-5-8. EXEMPTED SECURITIES.—A public utility may issue securities, other than stock or stock certificates, payable at periods of nit more than eighteen months after the date of issuance of same, and secured or unsecured, without application to or order of the commission, but no such securities so issued shall in whole or in part be refunded by any issue of stocks, stock certificates or other securities having a maturity of more than eighteen months, except on application to and approval of the commission. *A public utility may issue and deliver notes, bonds, or other evidence of indebtedness and security therefos to the United States of America or any agency or instrumentality thereof without application to or order from the commission.*

68-5-9. PROMPT DISPOSAL OF APPLICATION FOR ISSUANCE OF SECURITIES.—All applications for the issuance, assumption or guarantee of secusities shall be placed at the head of the commission's docket and shall be disposed of promptly, and within thirty days after petition is filed with the commission unless it is necessary for good cause to continue same for a longer period. Whenever such application is continued beyond thirty days after the time it is filed, the commission shall enter an order making such continuance and stating fully the facts necessitating same.

68-5-10. SECURITIES NOT OBLIGATION OF STATE.—No provision of this act, nor any act or deed done or performed in connection therewith, shall be construed to obligate the state of New Mexico to pay or guarantee in any manner whatsoever any security authorized, issued, assumed or guaranteed under the provisions of this act.

68-5-11. SECURITIES VOID UNLESS APPROVED.—All securities issued, assumed or guaranteed without application to and approval of the commission, except the securities mentioned in section 20 of this act, shall be void.

68-5-12. CONSOLIDATIONS—ACQUISITION OF STOCK —DISPOSITION OF PROPERTY—CONSENT OF COMMISSION.—With the express authorization of the commission, but not otherwise, (a) any two or more public utilities may consolidate or merge with each other, or so as to form a new concern, (b) any public utility may acquire the stock or any part thereof of any other public utility, (c) any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system.

68-5-13. APPLICATION FOR CONSOLIDATION, PURCHASE OF STOCK OR DISPOSITION OF PLANT—APPROVAL OF COMMISSION.—Application shall be made by the interested public utility by written petition containing a concise statement of the proposed transaction, the reason therefor and such other information as may reasonably be required by the commission. Upon the filing of such application, the commission shall promptly investigate the same, with such hearing and upon such notice as the commission may prescribe, and unless the commission shall find that the proposed transaction is unlawful or is inconsistent with the public interest, it shall give its consent and approval in writing.

68-5-14. VALUATION BY THE COMMISSION.—When in the exercise of its powers and jurisdiction, it shall be necessary for the commission to consider or ascertain the valuation of the properties or business of a public utility, it shall, in arriving at such valuation, give due consideration to the history and development of the property and business of the particular public utility, to the original cost thereof, and to the cost of reproduction as a going concern, and to other elements of value recognized by the laws of the land for rate making purposes. For the purpose of making such valuation the members of the commission and its duly authorized agents and employees shall at all reasonable times have free access to the property, accounts, records and memoranda of the utility whose property and rights are being valued, and such utility shall aid and co-operate with the commission and its duly authorized agents and employees to the fullest degree for the purpose of facilitating such investigation.

68-5-15. CONTRACT RATE BETWEEN A MUNICIPALITY AND A UTILITY—ESTABLISHMENT.—Rates and service regulations may be established by contract between the municipality and the utility for a specified term not exceeding twenty-five years, but only by and with the approval of the commission to be expressed by its order. Whenever any such contract shall be made, it shall, before becoming effective, be submitted to the commission. Unless the commission shall find the provisions of any such contract inconsistent with the public interest, the interest of consumers and the interest of investors, it shall approve the same, otherwise it shall disapprove the same, and unless and until so approved, such contract shall be of no effect; but if it be approved, it shall be in all respects lawful; any such new contract shall provide for a redetermination by the commission of the reasonableness of the rates at such intervals as the commission may prescribe not longer than five years; and every order made by the commission approving any contract shall expressly state the intervals at which redetermination of rates shall be made. For the purpose of determining whether any such contract hereafter made is consistent with public interest, the commission shall hold such hearings, after notice, as may be necessary to its determination. This act is intended to make rates in existing franchises and contracts subject to the control of the commission only to the extent that the legislature may lawfully do so.

68-5-16. COMMISSION MAY PRESCRIBE UNIFORM ACCOUNTS.—The commission may, when it deems it advisable to do so, upon notice and hearing, establish a uniform system of accounts for each utility, which system shall be uniform for all utilities of the same kind and class, and may make such regulations regarding the accounts of each utility for the purpose of insuring uniform and correct books of account and record as in the judgment of the commission may be necessary to carry out any of the provisions of this act.

68-5-17. OFFICE—BOOKS AND RECORDS.—Every utility furnishing service within the state shall maintain an office located in the state. The commission by order may require any utility or any office or agent thereof, to produce within the state, at such reasonable time and place as it may designate, any books, records, accounts, or documents kept in any office or place within or without the state, or certified copies thereof, whenever the production thereof is reasonably required and pertinent to any matter under investigation before the commission, in order that an examination thereof may be made by the commission, or by any authorized person employed by the commission.

68-5-18. UTILITIES REQUIRED TO REPORT TO COMMISSION.—Every utility when and as required by the commission shall file with the commission such annual report and such other information as the commission may reasonably require. The commission shall prepare and distribute to every utility blank forms for the reports required under this section.

68-5-19. STANDARD OF SERVICE.—The commission may prescribe reasonable and adequate service regulations and standards of service rendered or to be rendered by any utility, and may prescribe such regulations for the examination and testing of such service and for the measurement thereof.

68-5-20. METER ACCURACY.—The commission may prescribe reasonable rules, regulations and standards to secure the substantial accuracy of all meters and other devices for measurement of utility service or products which shall be complied with by the utility and consumer.

68-5-21. INSPECTION OF METERS AND OTHER DEVICES FOR MEASURING PUBLIC UTILITY SERVICE.—The commission shall adopt rules, regulations and standards to secure the accuracy of all meters and other devices for measurement of utility service or products, and the commission may examine and test any and all such meters and other devices under such rules and regulations as it may prescribe. At all inspections and tests made on complaints of consumers, representatives of the utility complained of and of the complainant may be present.

68-5-22. METERS AND OTHER MEASURING DEVICES —TESTING—FEES.—Any consumer or user may have any meter or measuring device tested by the utility once without charge after a reasonable period to be fixed by the commission by rule, and at shorter intervals upon payment of reasonable fees fixed by the commission. The commission shall declare and establish reasonable fees to be paid for other examining and testing such meters and other measuring devices on the request of the consumer. If the test is requested to be made within the period of presumed accuracy as fixed by the commission since the last such test of the same meter or other measuring device, the fee to be paid by the consumer or user at the time of his request shall be refunded to the consumer or user if the meter or measuring device be found unreasonably defective or incorrect to the substantial disadvantage of the consumer or user. If the consumer's request is made at a time beyond the period of presumed accuracy fixed by the commission since the last such test of the same meter or measuring device, the utility shall make the test without charge to the consumer or user.

68-5-23. AUTHORITY TO ENTER PREMISES.—The commission and its officers and employees of the commission may during all reasonable hours, after reasonable notice to the utility, enter upon any premises occupied by any utility for the purpose of making examinations and tests and exercising any power provided for in this act, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections, and shall be given sufficient time before the making thereof to secure the presence of a represntative of its selection.

68-5-24. SAFETY RULES AND REGULATIONS. — The commission shall have the right and is hereby empowered to adopt, promulgate and enforce such reasonable rules and regulations as may be required to protect users of gas or electricity from damage to their persons or property through the use of defective gas or electrical appliances or equipment, or improper installation thereof; and to require discontinuance by a consumer of the use of any defective appliance or equipment or the removal forthwith of any unsafe condition incident to the distribution of gas or electricity.

68-6-1. RATES.—Every rate made, demanded or received by any public utility shall be just and reasonable.

68-6-2. SERVICE.—Every public utility shall furnish adequate, efficient and reasonable service.

68-6-3. SCHEDULES.—Under such rules and regulations as the commission may prescribe, every public utility subject to the jurisdiction of the commission, shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The utility shall keep a copy of such schedules open to public inspection under such rules and regulations as the commission may prescribe.

68-6-3.1. *COMMISSION MAY REQUIRE CO-OPERATIVES TO FILE INFORMATION.—In addition to information otherwise required by law, the public service commission may adopt regulations relating to the filing with it by rural electric co-operatives of rate schedules, conditions of service, and any changes in such schedules or conditions as may be made together with such other information as the commission may deem advisable for the effective administration of the Public Utilities Act, as amended.*

68-6-4. SCHEDULES TO SHOW CLASSIFICATIONS.—Such schedules filed by every public utility shall set forth the classification of users and the rates to be charged as to each classification; and every utility shall have the right to make reasonable classifications of its users.

68-6-5. ADHERENCE TO SCHEDULES.—No public utility shall directly or indirectly, by any device whatsoever, or in anywise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this act, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.

68-6-6. DISCRIMINATION.—No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility shall establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service.

68-6-7. CHANGE IN RATES.—A. At any hearing as provided in this section involving an increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility.

B. Unless the commission otherwise orders, no public utility shall make any change in any rate which has been duly established except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new schedules which shall be kept open to public inspection. The commission for good cause shown may allow changes in rates without requiring the thirty days' notice, under such conditions as it may prescribe.

C. Whenever there is filed with the commission by any public utility any schedule proposing a new rate or rates, the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon the commission shall suspend the operation of such rate or rates, before they become effective but not for a longer initial period than nine months beyond the time when such rate or rates would otherwise go into effect, unless the commission shall find that a longer time will be required, in which case the commission may extend the period for an addition three months; Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect at the expiration of the initial suspension period by filing with the commission its undertaking, secured by its bond, to refund to the persons entitled theheto the amount, if any, finally determined to be excessive. The bond, in terms, amount and securities shall be subject to the commission's approval. There may be substituted for such bond other arrangements satisfactory to the commission for the protection of the parties interested; Provided further, that in any case involving a proposed change in rates the commission may permit the utility to make effective without suspension any portion of the change which the commission may determine to be proper under the circumstances. If the public utility fails to make refund within thirty days after such final determination, or within such additional period of time as may be allowed by the commission for good cause shown, any person entitled to such refund may sue therefor in any court of this state of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within one year after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear. During any such period of suspension the commission may, in its discretion, require that the public utility involved shall furnish to its consumers or patrons a certificate or other evidence of payments made by them under the rate or rates which the public utility has put into operation in excess of the rate or rates in effect immediately prior thereto.

D. If, after such hearing, the commission finds any such proposed rate or rates to be unjust, unreasonable, or in anywise in violation of law, the commission shall determine the just and reasonable rate or rates to be charged or applied by the utility for the service in question, and shall fix the same by order to be served upon the utility; or the commission by its order shall direct the utility to file new rates respecting such service which are designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable. Such rate or rates shall thereafter be observed until changed, as provided by the Public Utility Act.

68-6-8. INSPECTION AND SUPERVISION FEES.—Each utility doing business in this state and subject to the control and jurisdiction of the commission with respect to its rates or service regulations, *including corporations organized under sections* 45-4-1 *through* 45-4-32 *New Mexico Statutes Annotated,* 1953 *Compilation,* shall pay annually to the state a fee for the inspection and supervision of such business, an amount equal to one-half of one per cent (½%) of its gross receipts from business transacted in New Mexico for the preceding calendar year. Said sum shall be payable in equal quarterly installments on or before the last day of February, May, August and November, in each year. Such inspection and supervision fees shall be paid by such utilities in addition to any and all property, franchise, license, intangible, and other taxes, fees and charges now or hereafter provided by law. No similar inspection and supervision fee shall be measured by the amount of the gross receipts of each such utility for the calendar year next preceding the date herein fixed for the payment of the same. In the case of utilities engaged in interstate business, the fees shall be measured by the gross receipts of such utilities from intrastate business only, for such preceding calendar year, and not in any respect upon receipts derived wholly or in part from interstate business.

68-6-9.1. DISPOSITION OF FEES AND MONEYS COLLECTED—INTEREST ON DELINQUENT PAYMENTS.—All fees and money collected under the provisions of the Public Utility Act, and including fees and charges for stenographic services, for transcripts of evidence shall be remitted by the commission to the state treasurer not later than the day following the receipt thereof. Payments in the Public Utility Act provided for shall be obligatory upon all utilities subject to the Public Utility Act in the amounts provided and upon tse failure, neglect or refusal of any such utility to so pay and from the due date of the delinquency there shall be added to the amount due by the utility interest at the rate of one per cent per month until paid, and the attorney general, in the name of the state, shall bring suit to collect the same.

68-7-1. NEW CONSTRUCTION.—No public utility shall hereafter begin the construction or operation of any public utility plant or system or of any extension thereof, without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation; Provided that this section shall not be construed to require any such public utility to secure a certificate for an extension within any municipality or district within which it has heretofore lawfully comcenced operations, or for an extension within or to territory already served by it, necessary in the ordinary course of its business, or for an extension into territory contiguous to that already occupied by it and not receiving similar service from another utility; but, if any public utility in constructing or extending its line, plant or system unreasonably interferes or is about unreasonably to interfere with the service or system of any other public utility, the commission on complaint of the public utility claiming to be injuriously affected, may, after hearing, on reasonable notice, make such order and prescribe such terms and conditions in harmony with this act as are just and reasonable.

68-7-1.1. *APPLICATIONS BY UTILITIES BROUGHT UNDER PUBLIC UTILITY ACT.—A. Within ten days after the effective date of this* 1961 *act, each utility brought within the jurisdiction of the public service commission for the first time by virtue of this* 1961 *act, shall file with the commission an application for a certificate of convenience and necessity covering its present plant, lines and system. Upon proof of present existence and operation thereof, the commission shall grant the certificate to such utility.*

B. In the event the certificate granted a utility under subsection A of this section, overlaps or conflicts with a certificate heretofore issued by the commission and exercised within the time required under section 68-7-2 *New Mexico Statutes Annotated,* 1953 *Compilation, both certificates shall be valid and both utilities shall be permitted to continue service.*

68-7-2. AUTHORITY TO CONSTRUCT — EXERCISE WITHIN ONE YEAR.—Unless exercised within a period designated by the commission, but not exceeding one year from the grant thereof, exclusive of any delay due to the order of any court, or failure to obtain any grant of consent, authority conferred by a certificate of convenience and necessity issued by the commission shall be null and void; but the beginning of the construction of the plant, line, system, works, or facilities of such utility, in good faith, within the time prescribed by the commission, and the prosecution of the same with reasonable diligence, shall constitute a compliance with such certificate.

68-7-3. ABANDONMENT OF SERVICE REGULATED.—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser, and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits of such abandonment and the issuance of such a certificate. Upon the filing of such application and after public hearing of all interested parties appearing, the commission may, or may not, in its discretion, issue such certificate. The commission shall give due consideration to the relative cost and value of the service proposed to be abandoned.

68-7-4. CERTIFICATES — APPLICATION — ISSUANCE. —Before any certificate may issue under sections 68-7-1 through 68-7-4 New Mexico Statutes Annotated, 1953 Compilation, a certified copy of its articles of incorporation or charter, if the applicant be a corporation, shall be on file in the office of the commission. Every applicant for a certificate shall give such reasonable notice of its application as the commission may require and shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the consent and franchise from the municipality or H class county [or governmental authority controlling the territory] wherein construction and operation is proposed. The commission shall have power, after hearing, to issue said certificate, as prayed for, or to refuse to issue the same, or to issue it for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of said rights or privilege, and may attach to the exercise of the rights granted by said certificate and terms and conditions in harmony with the Public Utility Act as in its judgment the public convenience and necessity may require. If the public utility desires to exercise a right or privilege under a franchise which has not yet been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under rules and regulations as it may prescribe, issue the desired certificate, upon terms and conditions as it may designate, after the public utility has obtained the contemplated franchise. Upon the presentation to the commission of evidence satisfactory to it that the franchise has been secured by the public utility, the commission shall thereupon issue the certificate. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity as required by the provisions of the Public Utility Act, as amended, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction or operation until the commission makes and files its decision on said complaint or until the further order of the commission. The commission may after hearing, after reasonable notice, make such order and prescribe such terms and conditions in harmony with the Public Utility Act, as amended, as are just and reasonable.

68-8-1. COMPLAINTS AS TO RATES, CLASSIFICATIONS OR SERVICE—HEARING BY COMMISSION.—Upon a complaint made and filed by any municipality, or by any person or party affected, that any rate, service regulation, classification, practice or service in effect or proposed to be made effective is in any respect unfair, unreasonable, unjust, or inadequate, the commission may proceed, if the commission finds probable cause for said complaint, and without such complaint, the commission, whenever it deems that the public interest or the interest of consumers and investors so requires, may proceed, to hold such hearing as it may deem necessary or appropriate; but no such hearing shall be had without notice, and no order affecting such rates, service regulations, classifications, practice, or service complained of shall be entered by the commission without a hearing and notice thereof. Any utility may make complaint as to any matter within the provisions of this act affecting it.

68-8-2. OTHER HEARINGS BY COMMISSION. — The commission may in addition to the hearings specifically provided by this act conduct such other hearings as may be required in the administration of the powers and duties conferred upon it by this act, after notice as hereafter provided shall be given to the persons interested therein.

68-8-3. COMPLAINT TO BE FILED AND BECOME COMMISSION RECORD.—Whenever any complaint shall be made as herein provided, the same shall be filed and shall become a part of the permanent records of said commission; and whenever the commission without complaint shall determine that a hearing or investigation is neecssary or appropriate, it shall make written specifications of the matters to be considered upon such hearing or investigation, and the same shall be filed and become a part of the permanent records of said commission.

68-8-4. COMPLAINT AND SPECIFICATIONS—SERVICE ON UTILITY—PLACE FOR HEARING.—Whenever the commission shall determine to hold a hearing or conduct an investigation upon a complaint made and filed as in this article provided, it shall fix a time and place for public hearings thereupon; and whenever the commission shall determine to conduct a hearing or investigation upon specifications filed by it, it shall fix a time for public hearings of the matters under investigation; and a copy of the complaint or a copy of the specifications filed by the commission as basis for said hearings shall be served upon the person or utility interested. All hearings shall be held at the offices of the commission in Santa Fe, or at such place in the state as the commission may designate.

68-8-5. HEARINGS TO BE PUBLIC AND NOTICE OF HEARING TO BE GIVEN.—All hearings, and investigations, held or made by the commission, shall be public; and before proceeding to hold any such hearing or make any such investigation, the commission shall give the utility and the complainant at least twenty days notice of the time and place when and where such matters will be considered and determined, and all parties shall be entitled to be heard, through themselves or their counsel, and shall have process to enforce the attendance of witnesses. At the hearing held pursuant to such notice, the commission may take such testimony as may be offered or as it may desire.

68-8-6. SEPARATE HEARINGS OF SEVERAL COMPLAINTS.—When complaint is made of more than one matter or thing, the commission may, when convenience so requires, order separate hearings thereon, and may thereupon hear and determine the several matters complained of separately and at such times as it may prescribe. In any hearing, proceeding, or investigation conducted by the commission, any party may be heard in person or by attorney.

68-8-7. PRESIDING OFFICER FOR HEARINGS—TWO COMMISSIONERS TO BE PRESENT.—At all public hearings, the chairman of the commission, if present, shall preside. In the absence of the chairman, one of the other commissioners shall preside, and no public hearing or investigation shall be at any time conducted by less than two members of said commission.

68-8-8. PROCESS.—The commission, and each commissioner, may issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings pending before it, and such processes shall extend to all parts of the state and may be served by any person authorized to serve process out of the district courts of New Mexico.

68-8-9. WITNESSES.—The commission and each of the commissioners, for the purposes mentioned in this act may administer oaths, examine witnesses at any hearing and certify official acts. In case of failure on the part of any person or persons to comply with any lawful order of the commission, or with any subpoena or subpoena duces tecum, or in the case of the refusal of any witness to testify concerning any matter on which he may be interrogated lawfully, any court of record of general jurisdiction or a judge thereof, may on application of the commission or of a commissioner compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such a court or a refusal to testify therein.

68-8-10. DEPOSITIONS.—The commission or any commissioner or any party to the proceedings may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for taking depositions in civil actions, and any party as provided by law in civil actions may be required to answer written interrogatories propounded by the commission or any commissioner or any other party to the proceedings.

68-8-11. CERTIFIED COPIES—EVIDENCE. — Copies of official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner or by the secretary under the official seal of the commission to be true copies of the original shall be evidence in like manner as the originals, in all matters before the commission and in the courts of this state.

68-8-12. RECORDING ORDERS. — Every order, finding, authorization or certificate issued or approved by the commission under any provisions of this act shall be in writing and entered on the records of the commission. A certificate under the seal of the commission that any such order, finding, authorization or certificate has not been stayed, suspended or revoked, shall be received as evidence in any proceedings as to the facts therein stated.

68-8-13. FEES.—Witnesses who are summoned before the commission shall be paid the same fees and mileage as are paid to witnesses in the courts of record of general jurisdiction. Witnesses whose depositions are taken pursuant to the provisions of this act, and the officer taking the same, shall be entitled to the same fees as are paid for like services in such courts.

68-8-14. DECISIONS.—After the conclusion of any hearing the commission shall make and file its findings and order. The findings of fact shall consist only of such ultimate facts as are necessary to determine the controverted questions presented by the proceeding. Such findings shall be separately stated and numbered, and each thereof shall state briefly and plainly an ultimate fact necessary to determine a controverted question; and there shall be such a finding of fact as to each of the controverted questions presented by the proceeding. The order of the commission shall be based upon said findings of fact, and a copy of the findings of fact and of the order, certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceeding or their attorneys. Said order shall take effect and become operative thirty days after the service thereof, unless otherwise provided. If an order cannot in the judgment of the commission be complied with within thirty days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply therewith, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

68-8-15. RECORD OF PROCEEDINGS.—A full and complete record of all proceedings before the commission on any hearing held, and all testimony therein, shall be taken down by a competent reporter appointed by the commission. A copy of such transcript shall be furnished on demand to any party to such hearing upon the payment of a reasonable charge for reproducing the testimony, to be fixed from time to time by rules adopted by the commission.

68-8-16. REHEARING.—After an order or decision has been made by the commission, any party to the proceedings, may within thirty days after the entry of the order or decision apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters. The commission shall either grant or refuse an application for rehearing within twenty days after the application therefor is filed in the office of the commission; and a failure by the commission to act upon such application within that period shall be deemed a refusal thereof. If the application be granted, the commission's order shall be deemed vacated, and the commission shall enter a new order after the rehearing shall have been concluded.

68-9-1. PETITION FOR REVIEW.—Any party to any proceeding before the commission may file a petition in the district court of the county in which the complaint or controversy before the commission had its origin, asking for a review of the commission's final orders therein, and charging in said petition that said order or orders are unreasonable or unlawful. If an application for rehearing has been filed, a petition for review must be filed within thirty days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon, within the time specified in section 68-8-16 New Mexico Statutes, Annotated, 1953 Compilation. If an application for rehearing has not been filed, a petition for review must be filed within thirty days after the entry of the commission's order. Every petition for review shall name the New Mexico public service as a party respondent therein and shall state briefly the nature of the proceedings before the commission, and shall set forth the order complained of and the grounds upon which the same is claimed to be unreasonable or unlawful upon which the petitioner will rely in the district court. Failure to name the New Mexico public service commission as a party respondent in the petition for review shall make the said petition for review subject to dismissal with prejudice. Any person whose rights may be directly affected by said review may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

68-9-2. NOTICE TO THE COMMISSION.—Upon the filing of a petition for review, the petitioner shall cause notice of the filing, together with a true copy of the said petition for review to be served upon the commission in the manner prescribed for service of process in civil causes by the Rules of

Civil Procedure for the district courts of the state of New Mexico. Within thirty days after service of the petition for review of such further time as the district court for good cause may specify, the commission shall file its responsive pleadings and certify to the district court the record of the testimony taken before the commission and all exhibits offered or received in evidence at the hearing before the commission, and all pleadings, findings, conclusions, orders and opinions, or certified copies thereof, made and entered in, or in connection with, the hearing before the commission; Provided, however, that the parties and the commission may stipulate that a specified portion only of the testimony taken at the hearing before the commission shall be certified to the district court for use at the trial in said court.

68-9-3. TRIAL.—The trial of said cause in the district court shall be on the record made before the commission and the district court shall not permit the introduction of new evidence addressed to any of the issues presented at the hearing before the commission.

68-9-4. BURDEN OF SHOWING THAT THE ORDER IS UNREASONABLE OR UNLAWFUL.—The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful.

68-9-5. TRIAL AND JUDGMENT OR DECREE ON APPEAL.—The trial before the district court shall be before the court without a jury and the court shall have no power to modify said action or order appealed from, but shall either affirm or annul and vacate the same. The court shall vacate and annul the order complained of, if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful. Proceedings in the district court shall be governed by the provisions of this act and by the rules and practice and procedure in the district court promulgated by the Supreme Court of New Mexico.

68-9-6. SUSPENSION OF ORDER PENDING REVIEW.—The pendency of proceedings to review shall not of itself stay or suspend the operation of the order of the commission, but during the pendency of such proceedings, the district court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order on such terms as it deems just, and in accordance with the practice of courts exercising equity jurisdiction. Any party shall have the right to secure from the court in which a review of the order of the commission is sought an order suspending or staying the operation of an order of the commission, pending a review of such order, by securing the other parties against loss due to the delay in the enforcement of the order, in case the order under review is affirmed, in such amount and in such form as shall be directed by the court granting the stay or suspension.

68-9-7. APPEAL TO THE SUPREME COUURT—TIME OF APPEAL.—From the judgment or decree of the district court, an appeal may be taken by either party to the Supreme Court within the time provided by the rules of the Supreme Court of New Mexico for appeals from judgments of the district courts in civil actions. The procedure upon such appeal to the Supreme Court shall be in accordance with rules of the Supreme Court in case of appeal from judgments of the district court in civil actions.

68-10-1. MANDAMUS—INJUNCTION.—Whenever the commission shall be of the opinion that any person or utility is failing or omitting or about to fail or omit to do anything required of it by this act or by any order of the commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, contrary to or in violation of this act or of any order of the commission, it may direct the attorney general of New Mexico to commence an action or proceeding in the district court in and for the county of Santa Fe, or in the district court of the county in which the complaint or controversy arose, in the name of the state of New Mexico for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. The attorney general of New Mexico shall thereupon begin such action or proceeding by petition to such court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding thirty days after the service of the copy of the petition, within which the public utility or person complained of must plead, and in the meantime said public utility or person may for good cause shown be restrained. In case of default, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition; or in such modified or other form as will afford appropriate relief. An appeal may be taken as in other civil actions.

68-10-2. ACTIONS AGAINST COMMISSION. — In case the commission or its members shall undertake to act in excess of its jurisdiction and authority conferred under this act, or without jurisdiction; or in case the said commission or its membbers shall undertake to exercise rights or privileges not conferred upon it by this act or by law; or in case the said commission or its members shall fail or refuse in the performance of any duties or obligations imposed upon it by the terms of this act, then the person interested or whose rights are affected may bring suit by mandamus, prohibition, injunction, or other appropriate remedy against the said commission in its statutory name in this act provided, to compel performance of the duties and obligations imposed upon said commission by this act, or to restrain said commission and its members from the exercise of jurisdiction not by this act conferred. Consent of the state is hereby expressly given to the maintenance of such suits against said commission. Any such action shall be brought against said commission in the district court of Santa Fe County, New Mexico, or in the district court of the county in which the complaint or controvesry arose. Any judgment or decree entered against the commission shall be binding upon the commission and each and every member thereof.

68-10-3. ACTIONS PREFERRED.—All actions and proceedings under this act, and all actions or proceedings to which the commission or the state of New Mexico may be a party, and in which any question arises under this act, or under or concerning any order or decision of the commission, may be preferred over all other civil causes except election causes, irrespective of position on the calendar.

68-10-4. VIOLATION OF ORDERS.—Any person or corporation which violates any provision of this act, or which fails, omits or neglects to obey, observe or comply with any lawful order, or any part or provision thereof, of the commission is subject to a penalty of not less than one hundred dollars, nor more than one thousand dollars for each offense.

68-10-5. SEPARATE OFFENSES.—Every violation of the provisions of this act or of any lawful order of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.

68-10-6. PENALTIES CUMULATIVE.—All penalties accruing under this act shall be cumulative, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility or any officer, director, agent or employee thereof or any other corporation or person.

68-10-7. ACTION TO RECOVER PENALTIES.—Actions to recover penalties under this act shall be brought in the name of the state of New Mexico in the district court of Santa Fe County.

68-11-1. SHORT TITLE.—This act shall be known, and cited and referred to, as the Public Utility Act.

68-11-2.1. FEES.—The New Mexico public service commission shall collect the following fees, which shall be remitted to the state treasurer not later than the day following the receipt thereof.

For filing any rate schedule, service rule or regulation, or sample form, or amendment thereto, one dollar ($1.00).

For filing each application, petition or complaint, twenty-five dollars ($25.00).

For copies of papers, testimony and records, the reasonable cost of such copies as the commission may provide from time to time by rule.

For certifying any copy of any paper, testimony or record, two dollars ($2.00).

68-11-3. COSTS—TRANSFER OF CAUSE TO ANOTHER COUNTY.—In all proceedings before the commission and in the courts on review, each party to the controversy shall bear his own costs, and no costs shall be taxed against either party. After the filing of petition for review of any order of the commission, as hereinabove provided, the cause may be transferred to any county upon the agreement of all the parties to the cause or their attorneys, for hearing and determination by the district court within and for such county.

68-11-4. INTERSTATE COMMERCE NOT AFFECTED.—Neither this act nor any provision thereof shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

68-11-5. CONSUMERS COUNSEL — APPOINTMENT — SALARY—DUTIES.—After the appointment of a commission as in this act provided, the governor shall appoint an attorney at law licensed to practice in the courts of the state, to act as consumers counsel, whose duties shall be to represent consumers in the preparation and presentation of any and all petitions or complaints under this act, and to represent the interests of consumers in hearings and suits initiated under this act at the instance of any public utility, both before the commission and in the courts; but consumers shall have the right to be represented by private attorneys with or without the assistance of the consumers counsel. Such attorney shall be paid a salary of $4,000 a year, shall devote his entire time to the duties of his office, and shall have the assistance of a competent stenographer at such salary as may be fixed by the governor. Such salaries, together with the necessary expenses of the consumers counsel, shall be paid from the moneys collected under this act. It shall also be the duty of such attorney to make a continuing study and analysis of the public utility operations and practices in the state and to recommend to the governor and future legislatures such further legislation as may be found necessary to facilitate the work of the commission and to adapt the administration of public utility regulation to conditions in the state of New Mexico. Nothing herein provided shall be construed as relieving the commission of any of the duties and responsibilities devolving upon it under the provisions of this or any other act to safeguard the rights of the public and the consumers.

APPENDIX D

New Mexico Rural Electric Cooperative Act, as amended

45-4-1. SHORT TITLE. — This act may be cited as the "Rural Electric Cooperative Act."

45-4-2. PURPOSE.—Cooperative, nonprofit, membership corporations may be organized under this act for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas. Corporations organized under this act and corporations which become subject to this act in the manner hereinafter provided are hereinafter referred to as "cooperatives."

45-4-3. POWERS.—A cooperative shall have power:

(a) To sue and be sued, in its corporate name;

(b) To have perpetual existence;

(c) To adopt a corporate seal and alter the same at pleasure;

(d) To generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten per centum (10%) of the number of its members;

(e) To make loans to persons to whom electric energy is or will be supplied by the cooperative for the purpose of, and otherwise to assist such persons in, wiring their premises and installing therein electric and plumbing fixtures, appliances, apparatus and equipment of any and all kinds and character, and in connection therewith, to purchase, acquire, lease, sell, distribute, install and repair such electric and plumbing fixtures, appliances, apparatus and equipment, and to accept, or otherwise acquire, and to sell, assign, transfer, endorse, pledge, hypothecate and otherwise dispose of notes, bonds and other evidences of indebtedness and any and all types of security therefor;

(f) To make loans to persons to whom electric energy is or will be supplied by the cooperative for the purpose of, and otherwise to assist such persons in, constructing, maintaining and operating electric refrigeration plants;

(g) To become a member in one or more other cooperatives or corporations or to own stock therein;

(h) To construct, purchase, take, receive, lease as lessee, or otherwise acquire, and to own, hold, use, equip, maintain, and operate, and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber, electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment, and any and all kinds and classes of real or personal property whatsoever, which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

(i) To purchase or otherwise acquire, and to own, hold, use and exercise and to sell, assign, transfer, convey, mortgage, pledge, hypothecate, or otherwise dispose of or encumber, franchises, rights, privileges, licenses, rights-of-way and easements;

(j) To borrow money and otherwise contract indebtness, and to issue notes, bonds and other evidences of indebtedness therefor, and to secure the payment thereof by mortgage, pledge, deed of trust, or any other encumbrance upon any or all of its then owned or after-acquired real or personal property, assets, franchises, revenues or income;

(k) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation, all roads, highways, streets, alleys and bridges and upon, under and across all publicly-owned lands.

(l) To exercise the power of eminent domain in the manner provided by the laws of this state for the exercise of that power by corporations constructing or operating electric transmission and distribution lines or systems;

(m) To conduct its business and exercise any or all of its powers within or without this state;

(n) To adopt, amend and repeal by-laws; and

(o) To do and perform any and all other acts and things, and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized.

45-4-4. NAME.—The name of each cooperative shall include the words "electric" and "cooperative," and the abbreviation "Inc.," Provided, however, such limitation shall not apply if, in an affidavit made by the president or vice-president of a cooperative and filed with the state corporation commission, it shall appear that the cooperative desires to transact business in another state and is precluded therefrom by reason of its name. The name of a cooperative shall distinguish it from the name of any other corporation organized under the laws of, or authorized to transact business in, this state. The words "electric" and "cooperative" shall not both be used in the name of any corporation organized under the laws of, or authorized to transact business in, this state, except a cooperative or a corporation transacting business in this state pursuant to the provisions of this act.

45-4-5. INCORPORATORS.—Five or more natural persons, or two or more cooperatives, may organize a cooperative in the manner hereinafter provided.

45-4-6. ARTICLES OF INCORPORATION.—(a) The articles of incorporation of a cooperative shall recite in the caption that they are executed pursuant to this act, shall be signed and acknowledged by each of the incorporators, and shall state:

(1) The name of the cooperative;

(2) The address of its principal office;

(3) The names and addresses of the incorporators;

(4) The names and addresses of the persons who shall constitute its first board of trustees; and

(5) Any provisions not inconsistent with this act deemed necessary or advisable for the conduct of its business and affairs.

(b) Such articles of incorporation shall be submitted to the state corporation commission for filing as provided in this act.

(c) It shall not be necessary to set forth in the articles of incorporation of a cooperative the purpose for which it is organized or any of the corporate powers vested in a cooperative under this act.

45-4-7. BY-LAWS.—The original by-laws of a cooperative shall be adopted by its board of trustees. Thereafter by-laws shall be adopted, amended or repealed by the majority of the members present at any regular annual meeting or special meeting called for that purpose, a quorum being present. The by-laws shall set forth the rights and duties of members and trustees and may contain other provisions for the regulation and management of the affairs of the cooperative not inconsistent with this act or with its articles of incorporation.

45-4-8. MEMBERS.—(a) No person who is not an incorporator shall become a member of a cooperative unless such person shall agree to use electric energy furnished by the cooperative when such electric energy shall be available through its facilities. The by-laws of a cooperative may provide that any person, including an incorporator, shall cease to be a member of a cooperative if he shall fail or refuse to use electric energy made available by the cooperative or if electric energy shall not be made available to such person by the cooperative within a specified time after such person shall have become a member thereof. Membership in the cooperative shall not be transferable, except as provided in the by-laws. The by-laws may prescribe additional qualifications and limitations in respect to membership.

(b) An annual meeting of the members shall be held at such time as shall be provided in the by-laws.

(c) Special meetings of the members may be called by the board of trustees, by any three trustees, by not less than ten per centum (10%) of the members, or by the president, and the meeting shall be held at the place as may be designated in the petition.

(d) Annual meetings of members shall be held at such place as may be provided in the by-laws. In the absence of any such provision, all meetings shall be held in the city or town in which the principal office of the cooperative is located.

(e) Except as hereinafter otherwise provided, written or printed notice stating the time and place of each meeting of members and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be given to each member by the board of trustees or the secretary, or their legal representatives, either personally or by mail, not less than ten nor more than twenty-five days before the date of the meeting.

(f) Five per cent of all members, present in person, shall constitute a quorum for the transaction of business at all meetings of the members, unless the by-laws prescribe the presence of a greater number of the members for a quorum. If less than a quorum is present at any meeting, a majority of those present may adjourn the meeting from time to time without further notice.

(g) Each member shall be entitled to one vote on each matter submitted to a vote at a meeting. Voting shall be in person, but, if the by-laws so provide, may also be by proxy or by mail, they shall also prescribe the conditions under which proxy or mail voting shall be exercise. In any event no person shall vote as proxy for more than three members at any meeting of the members.

45-4-9. BOARD OF TRUSTEES.—(a) The business and affairs of a cooperative shall be managed by a board of not less than five trustees, each of whom shall be a member of the cooperative or of another cooperative which shall be a member thereof. The by-laws shall prescribe the number of trustees, the terms of the trustees and the manner of their election by the members, their qualifications, other than those provided for in this act, the manner of holding meetings of the board of trustees and of the election of successors to trustees who shall resign, die or otherwise be incapable of acting. The by-laws may also provide for the removal of trustees from office and for the election of their successors. Without approval of the members, trustees shall not receive any salaries for their services as trustees and, except in emergencies, shall not be employed by the cooperative in any capacity involving compensation. The by-laws may, however, provide that a fixed fee and expenses of attendance, if any, may be allowed to each trustee for attendance at each meeting of the board of trustees.

(b) The trustees of a cooperative named in any articles of incorporation, consolidation, merger or conversion, as the case may be, shall hold office until the next following annual meeting of the members or until their successors shall have been elected and qualified.

(c) A majority of the board of trustees shall constitute a quorum.

(d) If a husband and wife hold joint membership in a cooperative, either one, but not both, may be elected a trustee.

(e) The board of trustees may exercise all of the powers of a cooperative except such as are conferred upon the members by this act, or its articles of incorporation or by-laws.

45-4-10. VOTING DISTRICTS.—Notwithstanding any other provision of this act, the by-laws may provide that the territory in which a cooperative supplies electric energy to its members shall be divided into two or more voting districts, and that, in respect of each such voting district, (1) a designated number of trustees shall be elected by the members residing therein, or (2) a designated number of delegates shall be elected by such members, or (3) both such trustees and delegates shall be elected by such members. In any such case the by-laws shall prescribe the manner in which such voting districts and the members thereof, and the delegates and trustees, if any, elected therefrom shall function, and the powers of the delegates, which may include the power to elect trustees. No member at any voting district meeting and no delegate at any meeting shall vote by proxy or by mail.

45-4-11. OFFICERS.—The officers of a cooperative shall consist of a president, vice-president, secretary and treasurer, who shall be elected annually by and from the board of trustees. No person shall continue to hold any of the above offices after he shall have ceased to be a trustee. The offices of secretary and of treasurer may be held by the same person. The board of trustees may also elect or appoint such other officers, agents, or employees as it shall deem necessary or advisable and shall prescribe the powers and duties thereof. Any officer may be removed from office and his successor elected in the manner prescribed in the by-laws.

45-4-12. AMENDMENT OF ARTICLES OF INCORPORATION—(a) A cooperative may amend its articles of incorporation by complying with the following requirements:

(1) The proposed amendment shall be first approved by the board of trustees and shall then be submitted to a vote of the members at any annual or special meeting thereof, the notice of which shall set forth the proposed amendment. The proposed amendment, with such changes as the members shall choose to make therein, shall be deemed to be approved on the affirmative vote of not less than two-thirds of those members voting thereon at such meeting; and

(2) Upon such approval by the members, articles of amendment shall be executed and acknowledged on behalf of the cooperative by its president or vice-president and its corporate seal shall be affixed thereto and attested by its secretary. The articles of amendment shall recite in the caption that they are executed pursuant to this act and shall state: (a) the name of the cooperative; (b) the address of its principal office; (c) the date of the filing of its articles of incorporation in the office of the state corporation commission; and (d) the amendment to its articles of incorporation. The president or vice-president executing such articles of amendment shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with. Such articles of amendment and affidavit shall be submitted to the state corporation commission for filing as provided in this act.

(b) A cooperative may, without amending its articles of incorporation, upon authorization of its board of trustees, change the location of its principal office by filing a certificate of change of principal office, executed and acknowledged by its president or vice-president under its seal attested by its secretary, in the office of the state corporation commission and also in the office of the county clerk in each county in this state, in which its articles of incorporation or any prior certificate of change of principal office of such cooperative has been filed. Such cooperative shall also, within thirty days after the filing of such certificate of change of principal office in the office of the county clerk, file therein certified copies of its articles of incorporation and all amendments thereto, if the same are not already on file therein.

45-4-13. CONSOLIDATION.—Any two or more cooperatives, each of which is hereinafter designated a "consolidating cooperative," may consolidate into a new cooperative, hereinafter designated the "new cooperative," by complying with the following requirements:

(a) The proposition for the consolidation of the consolidating cooperatives into the new cooperative and proposed articles of consolidation to give effect thereto shall be first approved by the board of trustees of each consolidating cooperative. The proposed articles of consolidation shall recite in the caption that they are executed pursuant to this act and shall state: (1) The name of each consolidating cooperative, the address of its principal office, and the date of the filing of its articles of incorporation in the office of the state corporation commission; (2) the name of the new cooperative and the address of its principal office; (3) the names and addresses of the persons who shall constitute the first board of trustees of the new cooperative; (4) the terms and conditions of the consolidation and the mode of carrying the same into effect, including the manner and basis of converting memberships in each consolidating cooperative into memberships in the new cooperative and the issuance of certificates of membership in respect of such converted memberships; and (5) any provisions not inconsistent with this act deemed necessary or advisable for the conduct of the business and affairs of the new cooperative;

(b) The proposition for the consolidation of the consolidating cooperatives into the new cooperative and the proposed articles of consolidation approved by the board of trustees of each consolidating cooperative shall then be submitted to a vote of the members thereof at any annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed consolidation. The proposed consolidation and the proposed articles of consolidation shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of each consolidating cooperative voting thereon at such meeting; and

(c) Upon such approval by the members of the respective consolidating cooperatives, articles of consolidation in the form approved shall be executed and acknowledged on behalf of each consolidating cooperative by its president or vice-president and its seal shall be affixed thereto and attested by its secretary. The president or vice-president of each consolidating cooperative executing such articles of consolidation shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with by such cooperative. Such articles of consolidation and affidavits shall be submitted to the state corporation commission for filing as provided in this act.

45-4-14. MERGER.—Any one or more cooperatives, each of which is hereinafter designated a "merging cooperative," may merge into another cooperative, hereinafter designated the "surviving cooperative," by complying with the following requirements:

(a) The proposition for the merger of the merging cooperatives into the surviving cooperative and proposed articles of merger to give effect thereto shall be first approved by the board of trustees of each merging cooperative and by the board of trustees of the surviving cooperative. The proposed articles of merger shall recite in the caption that they are executed pursuant to this act and shall state: (1) The name of each merging cooperative, the address of its principal office, and the date of the filing of its articles of incorporation in the office of the state corporation commission; (2) the name of the surviving cooperative and the address of its principal office; (3) a statement that the merging cooperatives elect to be merged into the surviving cooperative; (4) the terms and conditions of the merger and the mode of carrying the same into effect, including the manner and basis of converting the memberships in the merging cooperative or cooperatives into memberships in the surviving cooperatives and the issuance of certificates of membership in respect of such converted memberships; and (5) any provisions not inconsistent with this act deemed necessary or advisable for the conduct of the business and affairs of the surviving cooperative;

(b) The proposition for the merger of the merging cooperatives into the surviving cooperative and the proposed articles of merger approved by the board of trustees of the respective cooperatives, parties to the proposed merger, shall then be submitted to a vote of the members of each such cooperative at any annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed merger. The proposed merger and the proposed articles of merger shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of each cooperative voting thereon at such meeting; and

(c) Upon such approval by the members of the respective cooperatives, parties to the proposed merger, articles of merger in the form approved shall be executed and acknowledged on behalf of each such cooperative by its president or vice-president and its seal shall be affixed thereto and attested by its secretary. The president or vice-president of each cooperative executing such articles of merger shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with by such cooperative. Such articles of merger and affidavits shall be submitted to the state corporation commission for filing as provided in this act.

45-4-15. EFFECT OF CONSOLIDATION OR MERGER.— The effect of consolidation or merger shall be as follows:

(a) The several cooperatives, parties to the consolidation or merger, shall be a single cooperative, which, in the case of a consolidation, shall be the new cooperative provided for in the articles of consolidation, and, in the case of a merger, shall be that cooperative designated in the articles of merger as the surviving cooperative, and the separate existence of all cooperatives, parties to the consolidation or merger, except the new or surviving cooperative, shall cease;

(b) Such new or surviving cooperative shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a cooperative organized under the provisions of this act, and shall possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, and all property, real and personal, applications for membership, all debts due on whatever account, and all other choses in action of each of the consolidating or merging cooperatives, and furthermore all and every interest of, or belonging or due to, each of the cooperatives so consolidated or merged, shall be taken and deemed to be transferred to and vested in such new or surviving cooperative without further act or deed; and the title to any real estate, or any interest therein, under the laws of this state vested in any such cooperatives shall not revert to be in any way impaired by reason of such consolidation or merger;

(c) Such new or surviving cooperative shall thenceforth be responsible and liable for all of the liabilities and obligations of each of the cooperatives so consolidated or merged, and any claim existing, or action or proceeding pending, by or against any of such cooperatives may be prosecuted as if such consolidation or merger had not taken place, but such new or surviving cooperative may be substituted in its place;

(d) Neither the rights of creditors nor any liens upon the property of any of such cooperatives shall be impaired by such consolidation or merger; and

(e) In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new cooperative; and in the case of a merger, the articles of incorporation of the surviving cooperative shall be deemed to be amended to the extent, if any, that changes therein are provided for in the articles of merger.

45-4-16. CONVERSION OF EXISTING CORPORATIONS. —Any corporation organized under the laws of this state for the purpose, among others, of supplying electric energy in rural areas may be converted into a cooperative and become subject to this act with the same effect as if originally organized under this act by complying with the following requirements:

(a) The proposition for the conversion of such a corporation into a cooperative and proposed articles of conversion to give effect thereto shall be first approved by the board of trustees or the board of directors, as the case may be, of such corporation. The proposed articles of conversion shall recite in the caption that they are executed pursuant to this act and shall state: (1) The name of the corporation prior to its conversion into a cooperative; (2) the address of the principal office of such corporation; (3) the date of the filing of articles of incorporation of such corporation in the office of the state corporation commission; (4) the statute or statutes under which such corporation was organized; (5) the name assumed by such corporation in compliance with the provisions of this act; (6) a statement that such corporation elects to become a cooperative, nonprofit, membership corporation subject to this act; (7) the manner and basis of converting either memberships in or shares of stock of such corporation into membership in the converted corporation; and (8) any provisions not inconsistent with this act deemed necessary or advisable for the conduct of the business and affairs of such corporation;

(b) The proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion approved by the board of trustees or board of directors, as the case may be, of such corporation shall then be submitted to a vote of the members or stockholders, as the case may be, of such corporation at any duly held annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed conversion. The proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion, with such amendments thereto as the members or stockholders of such corporation shall choose to make, shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of such corporation voting thereon at such meeting, or, if such corporation is a stock corporation, upon the affirmative vote of the holders of not less than two-thirds of the capital stock of such corporation represented at such meeting;

(c) Upon such approval by the members or stockholders of such corporation, articles of conversion in the form approved by such members or stockholders shall be executed and acknowledged on behalf of such corporation by its president or vice-president and its corporate seal shall be affixed thereto and attested by its secretary. The president or vice-president, executing such articles of conversion on behalf of such corporation shall also make and annex thereto an affidavit stating that the provisions of this section with respect to the approval of its trustees or directors and its members or stockholders, of the proposition for the conversion of such corporation into a cooperative and such articles of conversion were duly complied with. Such articles of conversion and affidavit shall be submitted to the state corporation commission for filing as provided in this act;

(d) The term "articles of incorporation" as used in this act shall be deemed to include the articles of conversion of a converted corporation.

45-4-17. INITIATIVE BY MEMBERS.—Notwithstanding any other provision of this act, any proposition embodied in a petition signed by not less than ten per centum (10%) of all members of the cooperative, together with any document submitted with such petition to give effect to the proposition, shall be submitted to the members of a cooperative either at a special meeting of the members held within forty-five days after the presentation of such petition or, if the date of the next annual meeting of members falls within ninety days after such presentation or if the petition so requests, at such annual meeting. The approval of the board of trustees shall not be required in respect of any proposition or document submitted to the members pursuant to this section and approved by them, but such proposition or document shall be subject to all other applicable provisions of this act. Any affidavit or affidavits required to be filed with any such document pursuant to applicable provisions of this act shall, in such case, be modified to show compliance with the provisions of this section.

45-4-18. DISSOLUTION.—(a) A cooperative which has not commenced business may dissolve voluntarily by delivering to the state corporation commission articles of dissolution, executed and acknowledged on behalf of the cooperative by a majority of the incorporators, which shall state:

(1) The name of the cooperative;

(2) The address of its principal office;

(3) The date of its incorporation;

(4) That the cooperative has not commenced business;

(5) That the amount, if any, actually paid in on account of membership fees, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto and that all easements shall have been released to the grantors;

(6) That no debt of the cooperative remains unpaid; and

(7) That a majority of the incorporators elect that the cooperative be dissolved.

Such articles of dissolution shall be submitted to the state corporation commission for filing as provided in this act;

(b) A cooperative which has commenced business may dissolve voluntarily and wind up its affairs in the following manner:

(1) The board of trustees shall first recommend that the cooperative be dissolved voluntarily and thereafter the proposition that the cooperative be dissolved shall be submitted to the members of the cooperative at any annual or special meeting the notice of which shall set forth such proposition. The proposed voluntary dissolution shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members voting thereon at such meeting;

(2) Upon such approval, a certificate of election to dissolve, hereinafter designated the "certificate," shall be executed and acknowledged on behalf of the cooperative by its president or vice-president, and its corporate seal shall be affixed thereto and attested by its secretary. The certificate

shall state: (a) the name of the cooperative; (b) the address of its principal office; (c) the names and addresses of its trustees; and (d) the total number of members of the cooperative and the number of members who voted for and against the voluntary dissolution of the cooperative. The president or vice-president executing the certificate shall also make and annex thereto an affidavit stating that the provisions of this subsection were duly complied with. Such certificate and affidavit shall be submitted to the state corporation commission for filing as provided in this act;

(3) Upon the filing of the certificate and affidavit with the state corporation commission, the cooperative shall cease to carry on its business except insofar as may be necessary for the winding up thereof, but its corporate existence shall continue until articles of dissolution have been filed by the secretary of state;

(4) After the filing of the certificate and affidavit by the state corporation commission the board of trustees shall immediately cause notice of the winding up of proceedings to be mailed to each known creditor and claimant and to be published once a week for two successive weeks in a newspaper of general circulation in the county in which the principal office of the cooperative is located;

(5) The board of trustees shall have full power to wind up and settle the affairs of the cooperative and shall proceed to collect the debts owing to the cooperative, convey and dispose of its property and assets, pay, satisfy and discharge its debts, obligations and liabilities and do all other things required to liquidate its business and affairs, and after paying or adequately providing for the payment of all its debts, obligations and liabilities, shall distribute the remainder of its property and assets among its members in proportion to the aggregate patronage of each such member during the seven years next preceding the date of such filing of the certificate, or, if the cooperative shall not have been in existence for such period, during the period of its existence; and

(6) When all debts, liabilities and obligations of the cooperative have been paid and discharged or adequate

provisions shall have been made therefor, and all of the remaining property and assets of the cooperative shall have been distributed to the members pursuant to the provisions of this section, the board of trustees shall authorize the execution of articles of dissolution which shall thereupon be executed and acknowledged on behalf of the cooperative by its president or vice-president, and its corporate seal shall be affixed thereto and attested by its secretary. Such articles of dissolution shall recite in the capption that they are executed pursuant to this act and shall state: (a) the name of the cooperative; (b) the address of the principal office of the cooperative; (c) that the cooperative has heretofore delivered to the state corporation commission a certificate of election to dissolve and the date on which the certificate was filed by the state corporation commission in the records of his office; (d) that all debts, obligations and liabilities of the cooperative have been paid and discharged or that adequate provision has been made therefor; (e) that all the remaining property and assets of the cooperative have been distributed among the members in accordance with the provisions of this section; and (f) that there are no actions or suits pending against the cooperative. The president or vice-president executing the articles of dissolution shall also make and annex thereto an affidavit stating that the provisions of this subsection were duly complied with. Such articles of dissolution and affidavit accompanied by proof of the publication required in this subsection, shall be submitted to the state corporation commission for filing as provided in this act.

45-4-19. FILING OF ARTICLES.—Articles of incorporation, amendment, consolidation, merger, conversion, or dissolution, as the case may be, when executed and acknowledged and accompanied by such affidavits as may be required by applicable provisions of this act, shall be presented to the state corporation commission for filing in the records of that office. If the state corporation commission shall find that the articles presented conform to the requirements of this act, he shall, upon the payment of the fees as in this act provided, file the articles so presented in the records of his office and upon such filing the incorporation, amendment, consolidation, merger, conversion, or dissolution provided for therein shall be in effect. The state corporation commission immediately upon the filing in his office of any articles pursuant to this act shall transmit a certified copy thereof to the county clerk of the county in which the principal office of each cooperative or corporation affected by such incorporation, amendment, consolidation, merger, conversion or dissolution shall be located. The clerk of any county, upon receipt of any such certified copy, shall file and index the same in the records of his office, but the failure of the state corporation commission or of a clerk of a county to comply with the provisions of this section shall not invalidate such articles. The provisions of this section shall also apply to certificates of election to dissolve and affidavits of compliance executed pursuant to subsection b (2) of section 18 of this act.

45-4-20. REFUNDS TO MEMBERS.—Revenues of a cooperative for any fiscal year in excess of the amount thereof necessary:

(a) To defray expenses of the cooperative and of the operation and maintenance of its facilities during such fiscal year;

(b) To pay interest and principal obligation of the cooperative coming due in such fiscal year;

(c) To finance, or to provide a reserve for the financing of, the construction or acquisition by the cooperative of additional facilities to the extent determined by the board of trustees;

(d) To provide a reasonable reserve for working capital;

(e) To provide a reserve for the payment of indebtedness of the cooperative maturing more than one year after the date of the incurrence of such indebtedness in an amount not less than the total of the interest and principal payments in respect thereof required to be made during the next following fiscal year; and

(f) To provide a fund for education in cooperation and for the dissemination of information concerning the effective use of electric energy and other services made available by the cooperative, shall, unless otherwise determined by a vote of the members, be distributed by the cooperative to its members as patronage refunds pro-rated in accordance with the patronage of the cooperative by the respective members paid for during such fiscal year. Nothing herein contained shall be construed to prohibit the payment by a cooperative of all or any part of its indebtedness prior to the date when the same shall become due.

45-4-21. DISPOSITION OF PROPERTY.—A cooperative may not sell, mortgage, lease or otherwise dispose of or encumber all or any substantial portion of its property unless such sale, mortgage, lease, or other disposition or encumbrance is authorized at a duly held meeting of the members thereof by the affirmative vote of not less than two-thirds of all of the members of the cooperative, and unless the notice of such proposed sale, mortgage, lease or other disposition or encumbrance shall have been contained in the notice of the meeting; Provided, however, that notwithstanding anything herein contained, or any other provisions of law, the board of trustees of a cooperative, without authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a dead or deeds of trust upon, or the pledging or encumbrancing of, any or all of the property, assets, rights, privileges, licenses, franchises and permits of the cooperative, whether acquired or to be acquired, and wherever situated, as well as the revenues and income therefrom, all upon such terms and conditions as the board of trustees shall determine, to secure any indebtedness of the cooperative to the United States of America or any instrumentality or agency thereof.

45-4-22. NONLIABILITY OF MEMBERS FOR DEBTS OF COOPERATIVE.—The private property of the members of a cooperative shall be exempt from execution for the debts of the cooperative and no member shall be liable or responsible for any debts of the cooperative.

45-4-23. RECORDATION OF MORTGAGES.—Any mortgage, deed of trust or other instrument executed by a cooperative or foreign corporation transacting business in this state, pursuant to this act, which, by its terms, creates a lien upon real and personal property then owned or after-acquired, and which is recorded as a mortgage of real property in any county in which such property is located or is to be located, shall have the same force and effect as if the mortgage, deed of trust or other instrument were also recorded or filed in the proper office in such county as a mortgage of personal property. Recordation of any such mortgage, deed of trust or other instrument shall cause the lien thereof to attach to all after-acquired property of the mortgagor of the nature herein described as being mortgaged or pledged thereby immediately upon the acquisition thereof by the mortgagor, and such lien shall be superior to all claims of creditors of the mortgagor and purchasers of such property and to all other liens, except liens of prior record, affecting such property.

45-4-24. WAIVER OF NOTICE.—Whenever any notice is required to be given under the provisions of this act or under the provisions of the articles of incorporation or by-laws of a cooperative, waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time fixed for the giving of such notice, shall be deemed equivalent to such notice. If a person or persons entitled to notice of a meeting shall attend such meeting, such attendance shall constitute a waiver of notice of the meeting, except in case the attendance is for the express purpose of objecting to the transaction of any business because the meeting shall not have been lawfully called or convened.

45-4-25. TRUSTEES, OFFICERS OR MEMBERS — NOTARIES.—No person who is authorized to take acknowledgments under the laws of this state shall be disqualified from taking acknowledgments of instruments executed in favor of a cooperative or to which it is a party, by reason of being an officer, director or member of such cooperative.

45-4-26. FOREIGN CORPORATIONS.—Any corporation organized on a non-profit or a cooperative basis for the purpose of supplying electric energy in rural areas and owning and operating electric transmission or distribution lines in a state adjacent to this state shall be permitted to extend its lines into and to transact business in his state without complying with any statute of this state pertaining to the qualification of foreign corporations for the transaction of business in this state. Any such foreign corporation, as a prerequisite to the extension of its lines into and the transaction of business in this state, shall, by an instrument executed and acknowledged in its behalf by its president or vice-president under its corporate seal attested by its secretary, designate the state corporation commission its agent to accept service of process in its behalf. In the event any process shall be served upon the state corporation commission, he shall forthwith forward the same by registered mail to such corporation at the address thereof specified in such instrument. Any such corporation may sue and be sued in the courts of this state to the same extent that a cooperative may sue or be sued in such courts. Any such foreign corporation may secure its notes, bonds or other evidences of indebtedness by mortgage, pledge, deed of trust or other encumbrance upon any or all of its then owned or after-acquired real or personal property, assets or franchises, located or to be located in this state, and also upon the revenues and income.

45-4-27. FEES.—The state corporation commission shall charge and collect for:

(a) Filing articles of incorporation, five dollars;

(b) Filing articles of amendment, three dollars;

(c) Filing articles of consolidation or merger, five dollars;

(d) Filing articles of conversion, five dollars;

(e) Filing certificate of election to dissolve, two dollars;

(f) Filing articles of dissolution, three dollars;

(g) Filing certificate of change of principal office,

45-4-28. TAXATION.—Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of sections 45-4-1 through 45-4-32 New Mexico Statutes Annotated, 1953 Compilation, shall pay annually, on or before July 1, to the state corporation commission, a tax of ten dollars for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Emergency Schol Tax Act [72-16-2 to 72-16-47]; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract.

45-4-29. EXEMPTION FROM JURISDICTION OF THE STATE CORPORATION COMMISSION.—Except as otherwise provided in this act, cooperatives shall be exempt in all respects from the jurisdiction and control of the state corporation commission of this state. Cooperatives shall not be subject to the provisions of chapter 93, Session Laws of New Mexico, 1921, or any acts amendatory thereof or supplementary thereto..

45-4-30. SECURITIES ACT EXEMPTION.—The provisions of the Securities Act, chapter 44, Session Laws of New Mexico, 1921, shall not apply to the issuance of any note, bond or other evidence of indebtedness issued, executed and delivered by any cooperative to the United States of America or any agency or instrumentality thereof. The provisions of said Securities Act shall not apply to the issuance of membership certificates by any cooperative.

45-4-31. "RURAL AREA," "PERSON" AND "MEMBER" DEFINED.—(a) "Rural area" means any area not included within the boundaries of any incorporated or unincorporated city, town, or village having a population in excess of five thousand persons; Provided, however, that the population of any city, town or village shall not be included in any rural area if said city, town, or village has a municipally-owned plant or any other operating utility; and Provided further, that any rural electric cooperative shall not be permitted to operate in any city, town or village without first having obtained a franchise from the governing authorities, when part or all of said city, town or village is included in a rural area; Provided further, however, that the provisions of this act shall not apply to the existing lines or facilities of any existing cooperative organization.

(b) "Person" includes any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof or any body politic; and

(c) "Member" means each incorporator of a cooperative and each person admitted to and retaining membership therein, and shall include a husband and wife admitted to joint membership.

45-4-32. CONSTRUCTION OF ACT.—This act shall be construed liberally. The enumeration of any object, purpose, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 499

THE NEW MEXICO PUBLIC SERVICE COMMISSION, and JOSEPH A. BURSEY, PHIL LUCERO and L. J. CHAMBARD, Commissioners,

and

OTERO COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

COMMUNITY PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of New Mexico (Appendix A of Petition, p. 37) is reported at 414 P. 2d 675 and will be included in Volume 76 N.M. when published.

JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico inasmuch as it rests on the adequate non-federal basis that the 1961 Amendment to the New Mexico Public Utility Act denied Respondent equal protection of the laws under the State Constitution.[1]

QUESTION PRESENTED

Whether the Supreme Court of New Mexico correctly held that the 1961 Amendment to the New Mexico Public Utility Act violated the equal protection clauses of the New Mexico and United States Constitutions by classifying rural electric cooperatives as public utilities under the Act, thereby giving them all of the benefits of that status without imposing on them the burdens which the Act imposes on Respondent and other members of the class.

STATEMENT

The controversy giving rise to this case originated when Petitioner Otero County Electric Cooperative, Inc., filed with the New Mexico Public Service Commission an objection to the proposed extension by Respondent of its existing facilities into contiguous territory for the purpose of rendering electric service to the Sun Valley Subdivision (R-244). The proposed extension was being made in response to the request of the owner of the subdivision and pursuant to a contract between the owner and Respondent for rendition of the service (R-243).

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[1] In concluding its decision, the Supreme Court of New Mexico stated:

> "We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18, of the New Mexico Constitution." Appendix A of Petition, p. 42.

The New Mexico Public Service Commission hereafter will be referred to as "the Commission", Petitioner Otero County Electric Cooperative, Inc., as "Otero", and Respondent Community Public Service Company as "Community".

After a hearing on the objection of Otero, the Commission granted a certificate of convenience and necessity embracing the subdivision to Otero and enjoined rendition of the service by Community (R-19, 25). In its pleading before the Commission (R-229, 232) Community asserted that Chapter 89 of Laws of New Mexico 1961 which purported to make electric cooperatives public utilities under the New Mexico Public Utilities Act, violated the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico, and that by reason thereof Otero had no standing as a public utility to object to the extension of its lines by Community.

This question was also raised by Community's pleading (R-8, 11) in the statutory review proceeding in which the District Court of Lincoln County, New Mexico, affirmed the decision of the Commission. The opinion below of the Supreme Court of New Mexico was on appeal from judgment of the District Court of Lincoln County.

The presence of the New Mexico Public Service Commission, and its Commissioners as parties to the review proceeding in the District Court and the appeal to the Supreme Court of New Mexico, and as Petitioners in this proceeding, results from § 68-9-1, N.M.S.A., 1953 Comp. (Appendix C of Petition, p. 79), which requires that the Commission be named as a party respondent in every petition for review of an order of the Commission by a District Court.

The constitutional issue decided by the Supreme Court of New Mexico is the product of a unique judicial and legislative history having its genesis in the enactment of the New Mexico Rural Electric Cooperative Act (Appendix D of Petition, p. 86) in the year 1939, and in the enactment of the New Mexico Public Utility Act (Appendix C of Petition, p. 52) in 1941. In the Public Utility Act of 1941, rural electric cooperatives organized under the Rural Electric Cooperative Act were expressly exempted from the jurisdiction of the Public Service Commission.[2] The Act further defined a "public utility" as:

> "every person not engaged solely in interstate business and except as hereinafter stated, that now does or hereafter may own, operate, lease or control:
>
> "(1) Any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity . . . ."[3]

In the year 1959, in the case of *Socorro Electric Co-op, Inc.* v. *Public Serv. Co.,* 66 N.M. 343, 348 P. 2d 88 (1959), the Supreme Court of New Mexico was confronted with the question of whether a cooperative was a "public utility", and thereby entitled to protest the extension of the lines and service of a regulated public utility. The court construed the above quoted definition of "public utility", and held that a cooperative could *not* come within this definition since it did not, and could not, render service "to or for the public" as required by the Act. This inability resulted from the provision of the Rural Electric Cooperative Act limiting an electric cooperative to sale of electricity to its members and "to governmental agencies and political subdivisions, and to other persons not in excess of ten per centum (10%) of the number of its members."[4]

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[2] Laws N.M. 1941, ch. 84, § 2; Appendix C of Petition, pp. 54, 55.

[3] Laws N.M. 1941, ch. 84, § 1; Appendix C of Petition, p. 53.

As the Court below recognized, the amendment of the Public Utility Act which followed in 1961, in effect, overruled the *Socorro* decision by legislative fiat, purporting to "make rural electric cooperatives into public utilities",[5] whether or not they met the public service requirement of the Act, which continued unchanged.

No contention is, or has ever been, made in this case that the legislature lacked the power to regulate rural electric cooperatives. As recognized in the opinion below,[6] the question presented was whether the manner in which the legislature sought to accomplish this purpose, by Chapter 89 of the Laws of 1961, transgressed the equal protection clause of either the Federal Constitution or the New Mexico Constitution.

While constitutional grounds other than discrimination in violation of the equal protection clauses of the Federal and State Constitutions were asserted below, the New Mexico Court did not reach them inasmuch as it concluded that the 1961 Act was vulnerable to the equal protection attack.[7]

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[4] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

[5] Appendix A of Petition, p. 38.

[6] *Ibid.*

In essence the Court below held that the 1961 Amendment discriminated against Community in that it sought to place cooperatives in the same class with Community yet did not require them to render service "to or for the public" as was required of the other members of the class, and further did not require the rates of cooperatives to be regulated when the rates of other members of the class were regulated. This discrimination, the New Mexico Court concluded, contravened the Fourteenth Amendment to the Federal Constitution and Article II, Sec. 18 of the Constitution of New Mexico, resulting in the invalidity of Chapter 89 of the Laws of New Mexico of 1961.[8]

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[7] Community also contended that the 1961 Amendment to the New Mexico Public-Utility Act deprived it of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the Constitution of the State of New Mexico (R-277). The Court below stated at the close of its decision:

> "Having concluded that the questioned legislation must be held invalid as violative of the Constitutions in the manner hereinabove discussed, it is not necessary for us to consider the additional grounds of unconstitutionality argued by Community in its brief." Appendix A of Petition, p. 43.

[8] Appendix A of Petition, p. 42.

ARGUMENT

I.

There Is No Jurisdiction To Review the State Judgment, Since the Judgment Rests on an Adequate Non-Federal Basis, in That the Court Below Held That the 1961 Amendment to the New Mexico Public Utility Act Denied Community Equal Protection of the Laws Under the State Constitution.

The decision below rests in part upon a federal question, yet in no event can the federal question be said to have been controlling in the disposition of the cause. The attack of Community on the validity of the 1961 Act was nowhere limited to its violation of the equal protection clause of the Fourteenth Amendment. In every instance Community asserted that the Act contravened the equal protection clauses of both the Fourteenth Amendment to the Federal Constitution and Article II, Sec. 18 of the Constitution of New Mexico (R-11, 50, 51, 95-97, 232, 233, 277, 278).

In its opinion the New Mexico Supreme Court made it quite clear that it was declaring the Act fatally defective on both the federal and state grounds.[9] Having concluded that under the 1961 Amendment, Otero "does not and cannot serve the public generally and does not have its rates controlled except in overlapping situations," and that this placed Otero at a decided advantage as compared to Community,[10] the Court said:

> "This is what is prohibited by the Fourteenth Amendment to the Constitution of the United States, and by Art. II, § 18, of the Constitution of New Mexico."[11]

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[9] *Ibid.*

[10] Appendix A of Petition, p. 40.

[11] *Ibid.*

Later in its opinion the Court again made clear that it reached its conclusion on state as well as federal grounds when it said:[12]

> "The language of this court in State v. Thompson, 57 N.M. 459, 463, 260 P. 2d 370, fully recognizes this rule under both the Constitutions of the United States and of New Mexico." Citing also *State* v. *Sunset Ditch Co.,* 48 N.M. 17, 145 P. 2d 219 (1944).

Any possible question as to whether the Supreme Court of New Mexico was relying on the provision of the New Mexico Constitution, in addition to the equal protection provision of the Federal Constitution, must be answered by the Court's own statement of the conclusion which it had reached:[13]

> "We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18, of the New Mexico Constitution."

In the words of Mr. Justice White, expressing the view of seven members of this Court in *Jankovich* v. *Indiana Toll Rd. Comm'n,* 379 U.S. 487, 491-92, 13 L. Ed. 2d 439, 443, 85 S. Ct. 493, 495-96 (1965):

> "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the

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[12] Appendix A of Petition, p. 42.

[13] *Ibid.*

> state judgment. New York City v. Central Savings Bank, 306 US 661, 83 L ed 1058, 59 S Ct 790, explained in Minnesota v. National Tea Co., 309 US 551, 556-557, 84 L ed 920, 923, 60 S Ct 676; Lynch v. New York ex rel. Pierson, 293 US 52, 79 L ed 191, 55 S Ct 16 . . . Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold."

The present case provides an even clearer instance for the application of the rule referred to by Mr. Justice White because the opinion of the Indiana court contained no express statement by the court of its reliance upon the state constitutional ground, in addition to the Federal ground, as does the opinion of the New Mexico Court.

It is to be noted also that Petitioners concede that the New Mexico Supreme Court based its decision in part on the state ground. They state in their Petition that the Court, after determining that the 1961 Act violated the Federal Constitutional provision, continued its opinion and "determined the 1961 amendments violative of the State constitutional provision. . . ."[14]

Under the circumstances here present, an absence of jurisdiction to review the opinion of the New Mexico Supreme Court below becomes quite apparent.

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[14] Petition, p. 12, footnote 12.

II

The Issue in the Present Case Has No Importance Outside the State of New Mexico and Is Not One Warranting Review by This Court

The issue in the present case is of no importance elsewhere since it arises from New Mexico's unique judicial and legislative background. Its very existence resulted from the decision of the New Mexico Court in *Socorro*[15] that an electrical cooperative could not qualify as a public utility, so long as the New Mexico statute made the rendition of service "to or for the public" a prerequisite for utility status. By the 1961 Amendment, the New Mexico legislature in effect undertook to overrule the *Socorro* decision by legislative fiat. Instead of adopting a comprehensive scheme which would have been constitutionally acceptable, the legislature attempted to accomplish its purpose by expressly including cooperatives in the statutory definition of public utilities.[16] The Amendment, however, did not change the requirement that a "public utility" render service "to or for the public",[17] nor did it change the statutory provision [18] whereby cooperatives were prohibited from rendering service to the public. Thus the legislature attempted to overcome *Socorro* by changing the form but not the substance of the statute. Its error was compounded when the legislation exempted the cooperatives from the general rate regulation[19] by the Public Service Commission which applied to all other members of the class in which it had placed cooperatives.[20]

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[15] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

[16] Laws N.M. 1961, ch. 89, § 2; Appendix B of Petition, p. 46.

[17] *Ibid.*

[18] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

The particular interplay between legislative and judicial action which produced the defective New Mexico Act has not occurred elsewhere.[21] Thus the resulting constitutional question, as to the validity of this ill advised legislative effort, review of which is now sought, is unique and is peculiar to New Mexico. Whatever its importance within the state, it has now been decided by the highest court of the state, and it has no importance elsewhere. Any local problems resulting from the decision are notable for the ease with which they can be disposed of by the next session of the legislature through legislation meeting constitutional standards.

The fact that the New Mexico situation is unique may well explain why the opinion below of the Supreme Court of New Mexico is the only reported case in the United States dealing with the issue here involved. It also demonstrates that a decision of this Court on the issue would affect no state other than New Mexico. Such a question can hardly be said to have immediate importance beyond the particular facts and parties involved which would justify its consideration by this Court.

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[19] Laws N.M. 1961, ch. 89, § 5; Appendix B of Petition, p. 48

[20] § 68-5-4; N.M.S.A., 1953 Comp.; Appendix C of Petition, p. 59.

[21] At least twelve other jurisdictions have subjected rural electric cooperatives to regulation by a public service commission (Alaska, Arkansas, Colorado, Delaware, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, New Hampshire and Virginia). In these jurisdictions either the legislation provides equality of regulation between cooperatives and other public utilities, or the legislation coupled with the judicial background does not create the inequality held constitutionally defective by the New Mexico Court below.

III.

The Decision Below Is Based Upon a Proper Application of Precedents of This Court and the Supreme Court of New Mexico, and Is Clearly Correct.

The denial of equal protection of the laws to Community which resulted from the 1961 Amendment to the Public Utility Act of New Mexico is readily apparent. But except for the 1961 Amendment, Otero had no standing to protest the extension of Community's lines to serve its customer. Community and Otero were placed in the same class of electric public utilities by the Amendment, each thereby being entitled to the full benefits bestowed by the Act, and yet there is an invidious difference in the burdens imposed on each by the Amendment.

In order for Community to gain the benefits of the Act as amended, it is required to render its services "to or for the public". This phrase had been construed by the New Mexico Court to entail the dedication or devotion of Community's entire plant, facilities, system and services to public use, to the extent that all members of the general public have a legal right to demand and receive its services.[22] On the contrary, however, Otero gains the benefits bestowed by the Act even though it does not and cannot render its services "to or for the public" since it is limited by statute to serving members of the cooperative and non-members, not in excess of 10 percent of the number of its members.[23]

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[22] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

Also, by reason of its inclusion in the definition of a public utility under the Act, Community's rates are subject to full regulation by the Commission.[24] On the other hand, Otero gains the benefits bestowed by the Act while its rates are regulated only in the exceptional situation where it has a certificate to serve in territory in which an overlapping or conflicting certificate has been issued to another public utility.[25]

Thus, there is a demonstrable lack of uniformity of treatment between members of the same class. This was the invidious discrimination found by the Court below to contravene the equal protection clauses of the Federal Constitution and of the Constitution of New Mexico.

In their elaborate arguments that no discrimination results from the 1961 Amendment to the Act, Petitioners incorrectly portray the situation presented below. They contend that Otero was rendering service "to or for the public" in the rural areas where it operated (Petition, pp. 18, 19, 26). This contention is irreconcilable with the prior decision of the New Mexico Court construing the statutory provision under which Otero was organized.[26] That provision, as interpreted by the New Mexico Court, prohibits Otero from rendering its services "to or for the public", since all members of the general public, even in any given rural area, do not have the legal right to demand its services.[27]

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[23] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86. See Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

[24] §§ 68-5-4, 68-6-1, N.M.S.A., 1953 Comp.; Appendix C of Petition, pp. 59, 68.

[25] Laws N.M. 1961, ch. 89, § 5; Appendix B of Petition, p. 48.

[26] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959), interpreting § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

Petitioners also contend that the only unequal treatment in rate regulation occurs when the investor owned utility is not in competition with the cooperative, a "situation which is not even claimed to exist in the case at bar" (Petition p. 27). They seem to imply by this statement that Otero's rates were subject to regulation by the Commission in the case at bar. This implication, and the contention based upon it, ignore the specific finding of the Commission in its Order which was relied upon by the Court below, that:

> "Otero's rates are fixed by its Board of Trustees and are not subject to regulation by the Public Service Commission." (R-23); Appendix A of Petition, p. 39.

Petitioner's argument that the members of Otero have a voice in the management of the cooperative and that this affords a reasonable and rational basis for the lack of full and complete regulation of the rates charged by Otero, also misapprehends the true situation which exists below. Regardless of any protection which may be afforded the members of Otero in this regard, the customers who are non-members of the cooperative, which may total 10 percent of the number of the members, have no voice whatsoever in the management of the cooperative and have no assurance of adequate electric service at fair, reasonable and just rates.[28] The discrimination against Community as to rate regulation, therefore, cannot be rationalized on this basis.

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[27] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

It was in this context that the Court below stated that insofar as Community sought to serve the public and Otero sought to serve customers who were not members of the cooperative, both companies were attempting to secure business out of which they could make a profit.[29] The Court could find no valid basis for applying one set of rules to Community and a different set of rules to Otero, and obviously there is no basis for such invidious discrimination.[30] It was also in this context that the Court below cited and quoted from *Frost* v. *Corporation Comm'n,* 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929). Contrary to the contention of Petitioners, it is obvious that in this context and as to the conclusion it reached on the equal protection issue, the New Mexico Court's application of the *Frost* case was eminently proper.

A careful consideration of the actual basis of the decision of the Court below makes it abundantly clear that the precedents of this Court and of the Supreme Court of New Mexico were properly applied by the Court below, and that the 1961 Amendment to the Public Utility Act of New Mexico denied Community equal protection of the laws and was violative of the Fourteenth Amendment of the United States Constitution, and of Article II, Section 18 of the New Mexico Constitution. The decision below, therefore, is clearly correct.

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[28] §§ 45-4-8, 45-4-20, N.M.S.A., 1953 Comp.; Appendix D of Petition, pp. 89, 102.

[29] Appendix A of Petition, p. 40.

[30] *Ibid.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 499

THE NEW MEXICO PUBLIC SERVICE
COMMISSION, and JOSEPH A. BURSEY,
PHIL LUCERO and L. J. CHAMBARD,
Commissioners,
and
OTERO COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioners,
vs.
COMMUNITY PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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REPLY TO POINT I OF ARGUMENT

Respondent attempts to argue by this Point I that the 14th Amendment played a small role in the formulation of the judgment and opinion of the Supreme Court of New Mexico, and that the Supreme Court of New Mexico placed its judgment upon an independent and adequate ground of decision, i.e., Art. II, § 18 of the New Mexico Constitution. This is simply erroneous.

The New Mexico Supreme Court first held that what it deemed to be discriminatory

> "is not permitted under the Constitution of the United States, Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483. The equal protection clause protects against 'invidious discrimination.' To our minds, the invidious discrimination present in the legislation under consideration is too apparent to require elaboration. See Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485." (Appendix A of Petition, pp. 40-41)

After stating the objection and basing it solely upon the 14th Amendment, the court below partially quoted a passage in *Frost v. Corporation Commission*, 278 U. S. 515 (1929), which it thought to be controlling. Only then did the Supreme Court of New Mexico return to the equal protection clause of Art. II, § 18 of the New Mexico Constitution, and only after first taking care to point out that the state constitutional provision and the 14th Amendment "have for all practical purposes the same effect." (Appendix A of Petition, pp. 41-42). Petitioners respectfully submit that one cannot reasonably conclude that, when read as a whole, the judgment rested upon an independent and substantial state constitutional provision.

Jankovich v. Indiana Toll Rd. Com'n., 379 U. S. 487 (1965), cited by respondent on page 8 of Brief of Respondent in Opposition, is not applicable for the reason that this Court therein held that it is not deprived of jurisdiction to review a state judgment relying on similar provisions in both the State and Federal Constitutions unless the state constitutional provision provides an "independent and adequate ground of decision." This is a case, unlike that cited by respondent, where the judgment and opinion of the Supreme Court of New Mexico "leaves the impression that the court probably felt constrained to rule as it did because of [decisions applying the 14th Amendment]," *Minnesota v. National Tea Co.*, 309 U. S. 551, at 554-55 (1940), or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U. S. 1, 5 (1950), with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of State law," *State Tax Com'n of Utah v. Van Cott*, 306 U. S. 511, 514 (1939).[1]

REPLY TO POINT II OF ARGUMENT

In its Point II, respondent argues that the New Mexico situation is unique and, while acknowledging that "the opinion below of the Supreme Court of New Mexico is the only reported case in the United States dealing with the issue here involved," concludes "that a decision of this Court on the issue would affect no state other than New Mexico." (Brief for Respondent in Opposition, pp. 10-11) While your petitioners humbly submit that the widespread affect of the decision within New Mexico and its adverse affect upon REA security on cooperatives' plant therein alone warrant this Court's consideration, it is untrue that the importance of the issue is limited to New Mexico.

Contrary to respondent's assertion, the judgment below has application in the East, West, North and South by directly challenging present or future state regulation of the rural electric cooperative as now organized, as well as affecting the tax dollars of United States taxpayers wherever situate invested in federally assisted and cooperatively supplied electricity. Moses, "Electrification and Telephone Programs," 30 Rocky Mountain Law Review 473, at 474 (1957-58) states:

> "Shortly after the adoption of the Rural Electrification Act in 1936, a so-called Model Rural Electrification Act was introduced and, with the usual variations generally encountered in the adoption of uniform laws, was adopted in twenty-seven states."

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[1] In addition, Supreme Court review cannot be evaded by the invocation of an insubstantial non-federal ground as a device to prevent a review of the decision upon the federal question. *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Ward v. Love County*, 253 U. S. 17, 22 (1920); *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 475-76 (1918); *Lawrence v. State Tax Commission*, 286 U. S. 276, 282 (1932). See also the cases cited in footnote 52, Petition, page 35, where in analgous situations this Court has granted certiorari.

Besides New Mexico, the following states are listed as having adopted the model act: Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia. Three of New Mexico's neighbors, for example, have rural electric cooperative legislation the same or similar to that held by the Supreme Court of New Mexico to conflict with state public utility regulation.[2] Can it thus be said that the issue in the present case has no importance outside New Mexico? The answer, petitioners respectfully submit, is no, and the issue is one warranting review by this Court.

REPLY TO POINT III OF ARGUMENT

In its final point, respondent argues that the decision is clearly correct based upon a proper application of the precedents of this Court. Respondent, however, cites only *Frost v. Corporation Commission*, supra, which petitioners have shown to have been misapplied (Petition, pp. 29-32), and does not discuss the conflict between the judgment below and the many other precedents of this Court set forth by petitioners (Petition, pp. 12-28). In addition, respondent did not attempt to refute the basic factual differences between the investor owned utility and the rural electric cooperative,[3] and the abuse of wasteful duplication sought to be remedied by New Mexico Laws 1961, Chapter 89, justifying different treatment. (Petition, pp. 12-24) In order to avoid repetition, petitioners respectfully re-submit the argument and authority contained in their petition herein.

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[2] Respondent focuses upon the service limitation of § 45-4-3(d) (Appendix D of Petition, p. 86), limiting Otero's service to members of the cooperative, governmental units and others not in excess of 10% of the number of its members, as the crux of the alleged discrimination. (Brief for Respondent in Opposition, pp. 4-6, 12-13) Oklahoma has the same limitation (Okla. Stat. Ann. § 437.2(d)) and Texas and Arizona have an even stricter service limitation, to members only (Vernon's Anno. Tex. Stat., Art. 1528b, § 4(4); Ariz. Code Ann. § 10-754(4)).

[3] Smith, "The Co-op as a Vehicle for Power Service," 60 Public Utilities Fortnightly 442 (1957) recognizes and emphasizes the differences between the cooperative and investor owned electric utility, in terms of non-profit vs. profit, one vote per member vs. one vote per share, patronage refunds vs. dividends, tax treatment, Federal loans, differing state utility regulation, and membership and ownership of assets. The author is an attorney for respondent in this case.

CONCLUSION

For the reasons stated in the Petition and hereinabove, it is respectfully submitted that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

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